CITATION: Canadian Union of Postal Workers v. Her Majesty in Right of Canada, 2016 ONSC 418
COURT FILE NO.: CV-11-436848
DATE: 20160428

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CANADIAN UNION OF POSTAL WORKERS/SYNDICAT DES TRAVAILLEURS ET TRAVAILLEUSES DES POSTES, DENIS LEMELIN, RON HANNON and JEREMY LECLAIR	)	*Paul J.J. Cavalluzzo and Adrienne Telford*, for the Applicants
Applicants	)	*Kathryn Hucal and Jon Bricker*, for the Respondent
– and –	)	
HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA	)	*John D.R. Craig and Christopher Pigott*, for the Intervener, Canada Post Corporation
Respondent	)	
– and –	)	
CANADA POST CORPORATION	)	
Intervener	)	
	)	**HEARD:** October 5, 6, 7, 8, 9, 2015

REASONS FOR JUDGMENT

APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure* and ss. 2(b), 2(d), and 24 of the *Canadian Charter of Rights and Freedoms,* and s. 52 of the *Constitution Act, 1982*

FIRESTONE J.

I. BACKGROUND

[1] On June 26, 2011, following six days of parliamentary debate, the *Restoring Mail Delivery for Canadians Act*, S.C. 2011, c. 17 ("the Act"), came into force. The Federal Minister of Labour had tabled the legislation amid growing concern over the impact of a labour dispute between Canada Post ("the Corporation") and the Canadian Union of Postal Workers ("CUPW"; "the Union"). The bargaining dispute had escalated to rotating strikes and a nation-wide lockout. The Act ordered a cessation of these activities and the immediate resumption of postal services.

[2] CUPW brings this application under Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits the commencement of a proceeding by application where the relief claimed is a remedy under the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The Union challenges the constitutionality of the Act on the grounds that it infringes the *Charter* guarantees of freedom of association and freedom of expression. It seeks remedies under s. 52 of *The Constitution Act, 1982* and under s. 24(1) of the *Charter*.

[3] The Act is back-to-work legislation. Its key provisions mandated the resumption and continuation of mail delivery services, and imposed a final offer selection process of arbitration (FOS) for resolving the dispute between Canada Post and CUPW. It also contained an enforcement mechanism; non-compliance with its provisions would constitute a summary conviction offence punishable by fines accruing daily.

[4] In furtherance of ordering the resumption of postal services, the Act prohibited the Corporation from impeding its employees' return to work (s. 4), and prohibited the Union from engaging in any act that might encourage postal workers' non-compliance with the resumption of their duties (s. 5).

[5] Section 6 of the Act extended the term of the previous collective agreement, declaring it effective and binding until a new agreement was reached. Section 7 prohibited lockouts and strike activity during the period of this extension.

[6] In ss. 8-13, the Act set out the parameters of the arbitration process, FOS, which it imposed on the parties to resolve matters remaining in dispute if negotiations proved unsuccessful. The Act established guiding principles for the arbitrator to follow in s. 11(2), which states:

> (2) In making the selection of a final offer, the arbitrator is to be guided by the need for terms and conditions of employment that are consistent with those in comparable postal industries and that will provide the necessary degree of flexibility to ensure the short- and long-term economic viability and competitiveness of the Canada Post Corporation, maintain the health and safety of its workers and ensure the sustainability of its pension plan, taking into account
>
> > (a) that the solvency ratio of the pension plan must not decline as a direct result of the

new collective agreement; and

(b) that the Canada Post Corporation must, without recourse to undue increases in postal rates, operate efficiently, improve productivity and meet acceptable standards of service.

[7] FOS is distinct from conventional interest arbitration in that the arbitrator is bound to select the proposal of one party only, in its entirety, rather than crafting an award that draws from the offers of both parties. Section 13(1) allowed Canada Post and CUPW to continue to negotiate with a view to entering into a mutually-acceptable collective agreement, provided that the agreement was concluded before the arbitrator selected one party's final offer. However, s. 13(2) and (3) of the Act contained restrictions on the content of a new collective agreement. The term of the agreement and the extent of wage increases were fixed. Sections 14 and 15 provided that the constraints placed on term and wage increases in an arbitrated solution would apply to a negotiated solution as well.

[8] Finally, s. 18 of the Act made it an offence, punishable on summary conviction, to contravene any of the Act's provisions. For each day that a representative of the Union or the employer contravened the Act, they would be fined up to $50,000; other individuals would be fined $1,000 per day. If the Union or the employer, as entities, contravened the Act, the fine could climb as high as $100,000 per day.

II. ISSUES IN DISPUTE

[9] There are three key issues in this application:

1) Did the Act unjustifiably violate the guarantee of freedom of association under s. 2(d) of the *Charter*?
   a) Did the Act substantially interfere with a meaningful process of collective bargaining?
   b) If there was a violation, was it justified under s. 1 of the *Charter*?
2) Did the Act unjustifiably violate the guarantee of freedom of expression under s. 2(b) of the *Charter*?
   a) Did the Act restrict expressive content that was not excluded from protection by either the method or location of the expression, and did this restriction arise from the purpose or the effect of the legislation?
   b) If there was a violation, was it justified under s. 1 of the *Charter*?
3) What is the appropriate remedy in this case?

III. REMEDIES SOUGHT

[10] In their Notice of Application, filed in October of 2011, the Applicants requested the following remedies:

a. A declaration that the *Restoring Mail Delivery for Canadians Act*, S.C. 2011, c. 17 ("*Act*" or "Bill C-6") violates the right to freedom of association protected under s. 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and this violation is not saved under s. 1 of the *Charter*;
b. A declaration that the *Act* violates the right to freedom of expression protected under s. 2(b) of the *Charter* and this violation is not saved under s. 1 of the *Charter*;
c. A declaration that the provisions of the *Act*, and in particular s. 11 of the *Act*, violate the equality rights protected under s. 15(1) of the *Charter* and this violation is not saved under s. 1 of the *Charter*;
d. A declaration that the *Restoring Mail Delivery for Canadians Act*, S.C. 2011, c. 17 is unconstitutional and of no force or effect;
e. Such further and other relief under ss. 24 of the *Charter* and 52 of the *Constitution Act, 1982* as counsel may request and this Honourable Court permit;
f. Their costs of this application; and
g. Such further and other relief as counsel may request and this Honourable Court permit.

[11] The Applicants did not pursue the s. 15 equality aspect of their application in either their Notice of Constitutional Question or in argument before the court.

[12] In their Notice of Constitutional Question, the Applicants requested that the court order the following remedies if their application were successful:

a. A declaration that the *Act* violates freedom of association protected under sections [*sic*] 2(d) of the *Charter* and that this violation is not saved by section 1;
b. A declaration that the *Act* violates the right to freedom of expression protected under s. 2(b) of the *Charter* and that this violation is not saved under s. 1 of the *Charter*;
c. A declaration that the *Act* is unconstitutional and of no force and effect;
d. An order for the Applicants' costs of this application; and
e. Such further and other relief as counsel may request and the Honourable Court may deem to be just or appropriate.

IV. PROCEDURAL AGREEMENT ON THIS APPLICATION

[13] During the hearing of the application, the parties came to an agreement on the procedure for addressing the issue of remedy. The consent agreement was reduced to writing and filed with the court on October 7, 2015. In it, the Applicants advised that they are not seeking the invalidation of all or part of the collective agreement between CUPW and Canada Post that expired on January 31, 2015. They are, however, seeking declaratory relief and monetary damages under s. 52 of *The Constitution Act, 1982* and s. 24(1) of the *Charter*, respectively. The parties agreed to address the application and availability of those remedies at some point during the hearing of the application. If, after a finding on the merits of the application, any remedial issues are outstanding, the parties consented to address them through written and oral submissions and evidence, if requested by a party.

[14] For the reasons that follow I find that:

(a) the Act violates the rights to freedom of association and freedom of expression under ss. 2(d) and 2(b) of the *Charter*.

(b) such violations of the rights to freedom of association and freedom of expression are not saved under s. 1 of the *Charter*.

(c) the Act is unconstitutional and of no force and effect. Such declaration of invalidity is to be applied retroactively.

(d) the applicants are not entitled to a s. 24(1) *Charter* remedy in addition to the declaration of invalidity granted under s. 52(1) of *The Constitution Act, 1982*.

V. POSITIONS OF THE PARTIES

1) Did the Act unjustifiably violate the guarantee of freedom of association under s. 2(d) of the Charter?

a) Did the Act substantially interfere with a meaningful process of collective bargaining?

[15] Section 2(d) of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> [...]
>
> (d) freedom of association

The Applicants' Position

[16] The Applicants bear the onus of establishing that the Act occasioned a *prima facie* violation of s. 2(d) of the *Charter*. They take the position that the Act substantially interfered with a meaningful process of collective bargaining, violating the freedom of association guarantee. The Applicants submit that the Act eliminated postal workers' fundamental right to strike during a critical round of bargaining, replacing it with a dispute resolution process that was biased and unfair.

[17] Central to the Applicants' position is their submission that the government's suppression of strike activity forced the Union to accept a negotiated agreement that it would never have otherwise agreed to. The Union acceded to this negotiated collective agreement on terms that it considered unfavourable in order to avoid being subjected to an arbitrated resolution that could have been far worse. The Act imposed conditions upon any new collective agreement, be it negotiated or arbitrated, that included wage increase rates that were less favourable than what the employer itself had offered during the bargaining process prior to legislative intervention.

[18] The Applicants argue that the government failed to consult with workers on the nature of the dispute resolution process. The model the government imposed on the parties, a FOS arbitration scheme, was inappropriate for the complex issues in dispute and biased in favour of the employer. Rather than allowing the parties to select a mutually-acceptable arbitrator, the Act permitted the government, the sole shareholder in the Canada Post Corporation, to unilaterally select the arbitrator. The dispute resolution process was further constrained by the removal of two key issues, wage increases and the term of the agreement, from the arbitrator's jurisdiction. In sum, the threat of arbitration under these terms critically undermined the Union's bargaining position. It did so during a crucial round of bargaining, where the employer was seeking significant concessions.

[19] The Applicants contend that FOS was a wholly inappropriate model of arbitration in this case. Unlike conventional interest arbitration, FOS requires that the arbitrator select one party's final offer in its entirety, rather than drawing from elements of both parties' offers in order to craft a fair award.

[20] In the Applicants' submission, this "winner takes all" approach has corrosive effects on labour relations: Professor Hebdon, Chair of the Faculty Program in Industrial Relations, McGill University, Exhibit A, Applicants' Record, Volume 4, Tab 10A, pp. 1380-81. The Act imposed criteria to guide the arbitrator's selection of an offer that, the Applicants submit, favoured the employer. The guiding principles included ensuring the economic viability and competitiveness of the Corporation and the sustainability of its pension plan. The Act further stipulated that the arbitrator's selection should not lower the solvency ratio of the pension plan. Effectively, because the Act also imposed wage increases of a certain percentage, the arbitrator would be forced to reduce pension benefits to maintain the solvency ratio: Tian-Teck Go, Fellow of the Canadian Institute of Actuaries, Applicants' Record, Volume 5, Tab 13, p. 1639, paras. 26- 27.

[21] The solvency ratio requirement predetermined the outcome of the process in favour of the employer, who was seeking to counter the Union's demands for increased pension benefits. The Applicants' contention that the FOS process was biased in favour of the employer is demonstrated, they submit, by the fact that Canada Post backtracked from the position it had adopted prior to the legislation being passed: Denis Lemelin, CUPW's President and Director of Research, Reply Affidavit, Applicants' Record, Volume 3, Tab 8, p. 592, para. 11; Geoff Bickerton, Director of Research at the CUPW National Office, Applicants' Record, Volume 3 Tab 9, p. 798, para. 95.

[22] Even further, it put forth new demands that were not on the table until the legislation came into force, such as reducing the wage rate for new hires to $17.50/hour; the right to close all retail offices; a reduction in early retirement benefits for current employees; and the right to contract out additional work: Lemelin Reply, Applicants' Record, Volume 3, Tab 8, p. 597, para. 25; Bickerton, Applicants' Record, Volume 3, Tab 9, p. 798, para. 96. This shift in strategy, the Applicants contend, illustrates the strategic advantage the legislation conferred on the Corporation.

[23] Pursuant to s. 10 of the Act, the FOS process required that the parties indicate to the arbitrator the issues remaining in dispute between them. The arbitration scheme was so favourable to Canada Post, the Applicants argue, that the Corporation attempted to broaden the scope of the arbitrator's award by expanding the number of issues the arbitrator was to consider. Canada Post listed only three minor issues as having been resolved in the nearly nine months of bargaining that took place before the Act, and two hundred and twenty issues as remaining in dispute: Lemelin Reply Affidavit, Applicants' Record, Volume 3, Tab 8, p. 596, para. 25.

[24] It is the evidence of the Applicant that Canada Post has a history of bargaining with a view to legislative intervention: Lemelin Affidavit, Applicants' Record, Volume 1 Tab 2, p. 42, para. 57. The Union contends that in this case, the employer shifted its bargaining strategy when it became clear that back-to-work legislation was imminent.

[25] On the day the legislation was introduced, Canada Post announced to the Union that it was rescinding its offers of June 1 and June 6, reverting back to its offer of May 24, 2011, reducing proposed wage rates for new hires from a $19/hour wage rate to $18/hour and backtracking on other issues: Lemelin Reply, Applicants' Record, Volume 3, Tab 8, p. 592, para. 11.

[26] The Union argues that Canada Post ordered a nation-wide lockout because management knew that it would trigger a response from Parliament: Lemelin Affidavit, Applicants' Record, Volume 1, Tab 2, p. 42, para. 57. While Canada Post was hardening its position, the Union capitulated on nearly all of the Corporation's demands for rollbacks and concessions, including crucial breakthrough items: Guy Baron, Director General of the Federal Mediation and Conciliation Service, Respondent's Record, Volume 1, Tab 2, p. 41-43; Mark MacDonell, Chief Negotiator for Canada Post, Cross, pp. 35-36, Q. 115-118.

[27] The effects of the legislation were, the Applicants argue, severely prejudicial to postal workers. The Act interfered with Canada Post employees' capacity to act collectively to improve the conditions of their work, and as such, it was an affront to their human dignity and autonomy. While CUPW's strike mandate was achieved with 94.5% of voters in favour and the highest voter turnout in the Union's history (Lemelin, Applicants' Record, Volume 1 Tab 2, p. 32, para. 31), the turnout for the vote to ratify the collective agreement in December of 2012 was the lowest in CUPW's history, with less than 28% of the union membership voting. Fifty-six percent of those who voted favoured ratification, the lowest ratification vote for the Union since 1975: Lemelin Reply, Applicants' Record, Volume 3, Tab 8, p. 600, para. 35.

[28] The Applicants rely on the Supreme Court of Canada's decision in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 [*SFL*]. The majority in that case, adopting the language of the trial judge at para. 24, found that without the right to strike, collective bargaining is "meaningless." The recognition of the right to strike in *SFL* is consistent with past jurisprudence that acknowledges the deep, historical inequality between employers and employees and the role of the strike in ameliorating that inequality: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27,

2 S.C.R. 391 [*Health Services*], at para. 84; *Reference Re Public Service Employee Relations Act (Alta.)*, 1 S.C.R. 313, 38 D.L.R. (4th) 161 [*Alberta Reference*], at para. 23.

[29] The Applicants argue that the infringement of their freedom to associate in this case was worse than the strike prohibition in *SFL* because the Act prohibited *all* postal workers from engaging in *any* kind of strike activity, notwithstanding that they did not perform an essential service. Removing the possibility of strike action eviscerated the Union's bargaining power at the moment of impasse.

[30] The Applicants point to CUPW's offers on wages before and after the introduction of back-to-work legislation as evidence of the devastating impact of the Act on the Union's ability to protect its members' interests. Specifically, the Applicants contrast the Union's last offer, on June 9, 2011, prior to the introduction of the Act, to its offer on June 21, 2011, the day after the legislation was tabled.

[31] Prior to the Act being tabled on June 20, the Union had proposed wage increases of 3.3% for year 1 and 2.75% for years 2-4. After the tabling of the Act, the Union's proposal on wage increases decreased to 1.9% for years 1-3 and 2% for year 4. On wage rates for new hires, CUPW's offer prior to the legislation being introduced was $24.64/hour; after the Act was introduced, the Union ultimately agreed to a new-hire wage rate of $19.50/hour. (The Corporation had proposed a rate of $19.00/hour.)

[32] On the issue of pensions for new hires, prior to the government announcing its intent to legislate, the Union proposed to study the issue for one year and then implement what was agreed upon. After the Act was tabled, the Union agreed to grant pensions to new hires when they reached 60 years of age and after 30 years of service. The Union conceded Canada Post's demand for a two-tier pension. Finally, on short-term disability, the Union had previously requested that the issue be referred to a working group to be studied, but, if no agreement could be reached, it objected to arbitration on this issue. After the introduction of the back-to-work legislation, the Union agreed to refer the issue to arbitration if an agreement could not be reached. This was a concession to Canada Post's demand. If the facts in *SFL* were found to constitute a violation of the s. 2(d) *Charter* freedom of association, says the Union, then the facts in this case clearly meet the threshold for a *Charter* infringement.

The Respondent's Position

[33] The Respondent submits that no s. 2(d) violation occurred as a result of the legislation. It points to the fact that, for almost nine months prior to the legislation being introduced, the Union and the Corporation engaged in extensive negotiation, conciliation, and mediation. Negotiation continued after the Act became law, and ultimately resulted in a freely-negotiated agreement between the parties. The arbitration scheme conceived of in the Act was fair and balanced. In any event, FOS was never resorted to. The prospect of a potentially unfavourable, arbitrated resolution to the labour dispute, in the Respondent's submission, incentivized concerted bargaining between the parties. It is the Respondent's submission that, in light of this context, it

cannot be said that limiting strike action amounted to substantial interference with a meaningful process of collective bargaining.

[34] The Respondent submits that the bargaining process which led to the tentative collective agreement reached by the parties on October 5, 2012 was a meaningful one. As evidence of this, the Respondent highlights the fact that the Union won significant gains on both wages and pension benefits. CUPW described the tentative agreement to its members as "vastly superior" to the offer the employer had made on July 19, 2012, the day that informal bargaining discussions had resumed: Chris Riddell, Professor in the Department of Labor Relations, Law, and History, Cornell University, Reply Affidavit, Respondent's Record, Volume 2, Tab 10, p. 372, paras. 14-15.

[35] With respect to wages, the parties agreed to cost-of-living increases over and above the wage increases stipulated in the Act. The Applicants argue that the Act's requirement that the solvency ratio of the pension plan remain the same effectively predetermined an outcome favourable to the employer. However, the Union was almost entirely successful on the pension benefits issue. The employer backed away from its proposals for a defined contribution plan for new employees and reduced early retirement eligibility for members under the existing plan. Canada Post's retreat on these issues, the Respondent submits, relying on the affidavit evidence of Mr. Riddell, demonstrates that the employer faced the same risk that the Union did in entering into FOS. That is to say, the risk posed to both parties by the FOS process mimicked the costs of disagreement in a strike-lockout system.

[36] The Respondent takes issue with the Applicants' submission on the pension plan solvency issue. It is inaccurate to state that the arbitrator would have been forced to reduce pension benefits in light of the fixed wage increases in the legislation. It was open to the parties to propose a valuation date as of which the solvency ratio would be assessed: Cross-examination of Mitch Frazer, Chair of the Pension and Employment Practice at Torys LLP, p. 40, Q. 145-146. Depending on the date chosen to be the valuation date, future wage increases, like those stipulated in the Act, would not necessarily have constrained the solvency calculation: Frazer Affidavit, Respondent's Record, Volume 1, Tab 6, pp. 238-243, paras. 24 and 38. Wages are not the only factor affecting the solvency ratio. The parties could have proposed amendments to ancillary pension benefits, for example, to address the solvency criterion.

[37] The Respondent relies on the Supreme Court of Canada's ruling in *Health Services*, *supra*, at para. 89, for its submission that Parliament is permitted to enact legislation that interferes with collective agreements. Not all interference with the right to strike will rise to the level contemplated in *SFL*. In *SFL*, the impugned legislation prohibited workers from taking *any* strike action *ab initio*: see para. 78. In that case, it was the statute's removal of the very *possibility* of workers engaging in a work stoppage that hampered their ability to negotiate with their employer on an equal footing: see para. 55. In the present case, says the Respondent, the Union had the benefit of the potential to strike for the duration of the 100-plus days of actual bargaining that preceded the work stoppages.

[38] In *Meredith v. Canada (Attorney General)*, 2015 SCC 2, 1 S.C.R. 125, the Supreme Court of Canada determined that no s. 2(d) violation arose as a result of a decision to implement wage increases for RCMP members that were less than what had previously been established: see paras. 7 and 10. The wage increases in that case were consistent with the rate negotiated with other bargaining agents and therefore reflected an outcome consistent with actual bargaining processes. This was also the case, in the view of the Respondent, with the wage rates chosen by Parliament in drafting back-to-work legislation for Canada Post employees. The increases provided for by the Act were identical to those contained in recent settlements with several public sector bargaining units, and were selected on the basis of their consistency with this pattern: Carl Trottier, Executive Director within the Compensation and Labour Relations Sector of the Treasury Board Secretariat, Affidavit, Respondent's Record, Volume 1, Tab 4, p. 199, para. 12; House of Commons Debates, Respondent's Book of Authorities, Volume 1, Tab 2, at pp. 691, 745, 1103, 1105-1106.

[39] According to the Respondent, the Act does not rise to the level of substantial interference with a meaningful process of collective bargaining for four reasons. First, the government took steps to ensure that a meaningful process of bargaining took place. That process included conciliation, mediation, and five instances of direct intervention by the Minister to promote a negotiated resolution of the dispute. The Minister's meetings were held pursuant to the Supreme Court of Canada's emphasis in *Health Services* on prior consultation with affected unions. Second, the Act contemplated continued negotiation by the parties up to the point of an arbitrator imposing an agreement. In fact, the parties concluded an agreement during that time, when the terms of the previous collective agreement were preserved pursuant to s. 7 of the Act. Third, contrary to the Applicants' submission that the nation-wide lockout was only ordered by Canada Post when the Corporation knew the Act's coming into force was imminent, the Respondent asserts that the Act was not contemplated until the employer's lockout. Finally, the Union was able to engage in rotating strike activity unhindered for almost two weeks.

[40] The Respondent submits that the Applicants' allegation that it would have agreed to different terms of a collective agreement had the Act not been passed is highly speculative and should not ground a finding of substantial interference with a meaningful process of collective bargaining. Evidence of outcomes can support a finding of a minor impact on a union's associational activity, but it is not determinative of a s. 2(d) analysis: *Meredith*, *supra* at para. 29.

The Intervener's Position

[41] Canada Post submits that the Act did not interfere with a meaningful process of collective bargaining. Rather, it created a framework for a freely-negotiated collective agreement. In its submissions, the Corporation sought to clarify the backdrop for the 2010-2011 round of collective bargaining. In its view, it faced threats to its continued financial viability, while the Union merely sought "improvements" to its employee entitlements: Cross-examination of Lemelin, pp. 33-34, Q. 116.

[42] While under tremendous financial and competitive pressures, Canada Post remained committed to the bargaining process. This commitment is evidenced by the presence of the

corporation's senior executives at the bargaining table. Relying on the affidavit evidence of Mark MacDonnell, leader and spokesperson for Canada Post's negotiating team, the Corporation sets out a chronology of events that, it submits, demonstrates that a meaningful process of collective bargaining occurred.

[43] Between November 1 and December 31, 2010, the parties met at side negotiating tables 33 times. From February to March 2011, there were 58 side table meetings. On March 15, 2011, Canada Post made a global offer. CUPW rejected it. Forty-two side table meetings took place between April and May 2011. On May 17, Canada Post made a second comprehensive offer, which CUPW also rejected, countering with its own global offer. This counter-offer was unacceptable to Canada Post, but wishing to maintain the bargaining momentum, it quickly made another offer. All of this is advanced to support a finding that a meaningful process of collective bargaining occurred before the government intervened with back-to-work legislation. Even then, bargaining continued. The dispute resolution mechanism provided for in the Act was fair to both parties and encouraged a negotiated resolution.

[44] The Intervener also urges the court to exercise caution in considering the evidence of CUPW's witnesses. Geoff Bickerton is an employee of CUPW. He has negotiated on the Union's behalf. It is his job to advance CUPW's interests. His evidence is in the nature of opinion evidence. Dr. Robert Hebdon worked for the Ontario Public Service Employees Union for 24 years. He is an active, public supporter of the New Democratic Party. In the Intervener's view, his background raises questions about his ability to provide the court with an independent, balanced opinion.

[45] If this application is allowed, the Intervener submits, it will generate significant uncertainty as to whether legislatures can replace industrial action with binding interest arbitration. This will call into question numerous labour regimes currently in force in Ontario and Canada, schemes that involve grievance mechanisms and place limits on the legality of strikes during bargaining processes. Allowing this application would upset the balance between workers and employers by giving unions a distinct and lopsided advantage.

b) If there was a violation, was it justified under s. 1?

[46] In circumstances where a court finds an infringement of a fundamental freedom, the onus rests with the government to justify that infringement under s. 1 of the *Charter*. Section 1 states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[47] The Respondent takes the position that, if this court should find that an infringement of s. 2(d) did occur, the infringement was justified under s. 1. Critical to the Respondent's position is the argument that while the Act restricted strike activity, the parties remained able to freely negotiate an agreement. The Act advanced a pressing and substantial legislative objective; the means adopted in the Act were rationally connected to the objective the Act aimed to achieve;

the provisions of the Act were minimally intrusive; and the salutary effects of the Act outweighed its deleterious effects: *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], pp. 138-140. Any infringement of the Applicants' freedom of association was, viewed in light of the overall context, proportionate and reasonable.

Pressing and Substantial Objective

The Respondent's Position

[48] The Respondent submits that the objective of the Act was pressing and substantial. The thrust of that objective was to stem the detrimental impact of postal service disruption on third parties, which has been recognized as constituting a pressing and substantial objective: *R.W.D.S.U. v. Saskatchewan (Dairy Workers case)*, [1987] 1 S.C.R. 460 [*RWDSU*], at para. 31. The Act also responded to concerns over Canada's economic recovery and the financial viability of Canada Post.

[49] The Respondent's position is that at this first stage of the justification analysis, legislatures must be afforded a measure of deference: *Carter v. Canada*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 97. Legislatures are best situated to make policy decisions that involve "reconciling conflicting values and interests" and "political, social and economic considerations [which] lie largely beyond the area of expertise of courts": *Advanced Cutting and Coring Ltd.*, [2001] 3 S.C.R. 209, at para. 239. The Respondent submits that the considerations that prompted the enactment of legislation in this case fall well within the margin of appreciation granted to Parliament.

[50] The Respondent points to the importance of postal services to the Canadian economy as a whole, and to small and medium-sized enterprises in particular, a sector of the economy that accounts for 54% of private sector GDP and that employs more than six million Canadians. The impact of a cessation of mail service on the Canadian economy would be significantly detrimental. In his affidavit, entered in the Respondent's Record, Volume 1, Tab 3, p. 184, Mokhtar Souissi, Director of the Research and Data Development Division, Labour Program, Human Resources and Skills Development Canada, attested that a labour disruption at Canada Post would result in $9 million to $31 million in lost GDP per week. Souissi's analysis, conducted with the aid of a computerized general equilibrium model, confirmed that the impact of a work stoppage would be felt not only by Canada Post, but indirectly by its suppliers, business customers, investors, and governments in the form of lost orders, investments, and tax revenues. The affidavit evidence of Corinne Pohlman is that small and medium-sized enterprises would suffer a total service-disruption cost of $200-million per day.

[51] The impact of a work stoppage at Canada Post would not only be economic, but social in nature. Dr. Robert Campbell, President and Vice-Chancellor of Mount Allison University, attested that for rural, Northern, and Native communities, mail is a vital form of communication: Intervener Record, Volume 1, Tab 1, p. 4, para. 8. Mail is also critical to the charitable and not-for-profit sectors. For persons with disabilities who rely on Canada Post for supplies, and for elderly and economically vulnerable Canadians, mail is a "vital service," a fact which the

Applicants' witness Denis Lemelin conceded under cross-examination (Respondent's Record, Volume 3, Tab 14, pp. 850-855, p. 22, p. 14).

[52] The Respondent submits that the Applicants' estimate of the number of Canadians who were impacted by rotating strike action is understated. CUPW's President and Director of Research, Denis Lemelin, acknowledged under cross-examination that the Applicants' estimate did not include the number of Canadians living outside the affected municipalities who would be sending mail to and receiving mail from them. Mail service is so interconnected that a disruption in one region can have, in the view of witness Robert Campbell, "ripple effects" on other locales: Campbell Affidavit, para. 70(a), Intervener Record, Volume 1, Tab 1, pp. 38-39. The degree of disruption caused by rotating strikes is compounded by their unpredictability. CUPW initially provided the 72 hours of notice of strike activity that is required by the *Canada Labour Code*, R.S.C. 1985 c. L-2, but the location and duration of subsequent rotating strikes was usually announced the evening before those strikes would begin. This uncertainty added to the pressure on the employer, while the impact on striking workers was mitigated by only depriving workers of one or two days' wages at a time.

[53] Ultimately, the government's intervention came in response to the full, nation-wide, lockout that Canada Post ordered on June 14. In the view of the government, this presented serious harm to the economy that would only continue without government intervention. This complete shut-down of postal service prompted the Minister of Labour to table legislation on June 20.

The Applicants' Position

[54] The Applicants draw three interpretive principles from the s. 1 jurisprudence to preface their response to the Attorney General's submissions. First, while a government may turn to a contextual analysis to establish a pressing and substantial objective, this type of analysis does not reduce the government's burden by lowering the standard of justification: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*], at para 134. Second, infringements of fundamental freedoms must only be upheld as "exceptions to their general guarantee": *Oakes*, at p. 137. Third, the courts should "stand ready to intervene" where legislation violates *Charter* rights, as the democratic values and principles underpinning the *Charter* demand: *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[55] The Applicants rely on the Supreme Court of Canada's ruling in *RJR-MacDonald*, citing McLachlin J. (as she then was) at para. 128: "No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, the law must perforce fail." The Applicants submit that the Respondent has not discharged the evidentiary burden for justifying an infringement of the *Charter*. They argue that the government's reliance on Hansard to ground its pressing and substantial objective is faulty from an evidentiary perspective. The Applicants contend that Hansard should not be used to support controversial factual claims that are central to the issues in dispute, citing *R. v. Malmo-Levine*, [2003] S.C.R. 571, at para. 28. In cases such as the present one, when legislative facts are likely to prove dispositive, the need for reliable and trustworthy evidence is high: *R. v. Spence*, [2005] 3 S.C.R. 458, at paras. 64-65. In the

Applicants' view, the Respondent has relied heavily on Hansard where it could have adduced sworn testimony that could have been scrutinized under cross-examination.

[56] The Applicants reject the Attorney General's assertions that Canada is entitled to deference from the courts at the initial stage of the justification analysis. In the Applicants' submission, an automatic call for deference to the state's regulation of labour regimes "takes an overbroad view of judicial deference": *Health Services* at para. 26. The courts should not extend deference to governments to the point of abdicating their role as final arbiter of the Constitution: *U.F.C.W., Local 1518, v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 63. The Respondent states the objectives of the legislation too broadly; this exaggeration, they submit, compromises the justification analysis under the *Oakes* test: *RJR-MacDonald*, at paras. 143-144.

[57] The Respondent's statement of the objectives of the Act is, in the Applicants' submission, disingenuous and without merit. The Applicants seek to illustrate their position with an example. Within hours of CUPW's announcement on June 14, 2011, that it would be continuing limited rotating strike activity rather than calling for a nation-wide strike, (which the Applicants submit the Union did in order to avoid triggering back-to-work legislation), Canada Post ordered a nation-wide lockout.

[58] This was the first time in the Corporation's history that it took such a measure. CUPW asserts that it did so in order to trigger legislative intervention. The Applicants make this assertion on the grounds that, in the days prior to the lockout, the Federal Minister of Labour had been publicly distinguishing the dispute between CUPW and Canada Post from the contemporaneous Air Canada dispute, which had escalated to a nation-wide strike. On the day Canada Post announced the lockout, it inflated its claim as to the revenue losses that had resulted from the rotating strikes: early in the day of June 14, the Corporation claimed it had lost $17 million in short-term revenue; after the announcement, the number soared to $100 million: Lemelin Affidavit, Applicants' Record, Volume 1, Tab 2, p. 43, para. 60; Corporation's media releases, Exhibits I, J, Applicants' Record, Volume 1, Tab 2I and 2J, pp. 292 and 294.

[59] The Corporation's Second Quarter Report for 2011 suggests that the Corporation only experienced a loss of $17 million for the entire second quarter: Lemelin Affidavit, Applicants' Record, Volume 1, Tab 2, p. 43, para. 60. The Applicants submit that the Attorney General has failed to analyze in a meaningful way how each of its asserted objectives satisfies the *Oakes* test. The objectives put forth by the Respondent fall into three categories: impact on third parties; impact on the employer; and impact on taxpayers. Of these, only the first has been found to constitute a pressing and substantial objective, and then only under limited conditions. Those limited conditions are set out in international legal instruments to which Canada is a party, specifically the International Labour Organization's ("ILO") *Convention No. 87*. And, the Applicant argues, the Supreme Court of Canada has consistently looked to Canada's commitments at international law to define the government's obligations under the *Charter*: *SFL*, at para. 65; *Alberta Reference*, at pp. 58-72; *Health Services*, at paras. 69-79; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 [*Fraser*], at para. 92; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 16.

[60] The objective of preventing harm to third parties was addressed by the Supreme Court of Canada in *RWDSU*. The court made it clear that only a certain degree of harm to third parties would justify the prohibition of strike activity. Third party harm must be of a sufficient severity to warrant overriding *Charter* rights. To justify the limitation of a constitutionally-guaranteed freedom, the harm to third parties must be "massive and immediate" and "focussed in its intensity": *RWDSU*, at pp. 477-478, *per* Dickson C.J. Economic regulation must not be "done at the expense of our fundamental freedoms", unless it is "in response to a serious threat to the well-being of the body politic or a substantial segment of it": *RWDSU*, at p. 487, *per* Wilson J. The harm to third parties in the present case did not, in the Applicants' submission, meet this threshold.

[61] The impact of a work stoppage on Canada Post cannot be a pressing and substantial objective, as Canada Post is a party to the labour dispute. The purpose of a strike is to put pressure on the employer and encourage a resolution of the dispute. Impact on the employer was not held in *RWDSU* to be a factor relevant to the s. 1 analysis: see at p. 478. Given that the employer in this case was responsible for ordering a lockout, it is inappropriate for the government to justify its legislative intervention on the basis that it needed to protect Canada Post's financial interests.

[62] In *Health Services*, the Supreme Court of Canada called for skepticism concerning attempts to justify the infringement of *Charter* rights on the basis of "budgetary constraints": see at para. 147. The Applicants argue that the government has tendered no evidence of any impact on taxpayers that would have resulted from permitting the parties to engage in free negotiations on pension and wages. The Applicants urge that the Respondent's vague claim in this regard should be rejected.

[63] The Applicants rely on the evidence of Professor Patrick Macklem detailing Canada's obligations under international law. Canada is bound by ILO *Convention No. 87*. ILO bodies interpret this convention as limiting the circumstances in which the right to strike may be abrogated. The right of public servants to strike may be fettered. The continuation of essential services, strictly defined, may also warrant restrictions on strike activity. Finally, strike rights may be curtailed for a limited time in the event of an acute national emergency: Affidavit of Patrick Macklem, Law Professor at the University of Toronto, Applicants' Record, Volume 2, Tab 7A, p. 515, para. 14.

[64] The Applicant submits that Professor Macklem's expert opinion on these three categories was adopted by the Supreme Court of Canada in *SFL* at para. 86. The Applicants suggest that prohibiting postal workers, who are *not* public servants, from striking is therefore only justified in two circumstances: in maintaining the provision of essential services and in the event of a national emergency. The *SFL* court upheld a strict definition of essential services at paras. 84-86, and the Applicants submit that postal workers do not meet that definition.

[65] Arguments advanced by the Respondent that the cessation of postal services deprived rural and Northern communities of a "vital" service are not cogent; only workers in the Urban Postal Operations unit, not the Rural and Suburban Mail Carriers unit, participated in strike activity. The impact of rotating strikes on vulnerable groups was attenuated by postal workers

continuing to deliver government cheques to those who most relied upon them – seniors, individuals with low incomes, and others who receive pension and social assistance cheques: Lemelin Affidavit, Applicants' Record, Volume 1, Tab 2, p. 47, para. 69; Baron Affidavit, Respondent's Record, Volume 1, Tab 2, pp. 36-37, para. 11.

[66] The circumstances giving rise to the legislation in this case did not constitute an acute national emergency "endangering the normal living conditions of the population": Affidavit of Macklem, Applicants' Record, Volume 2, Tab 7A, pp. 539-540, para. 76.

Rational Connection

The Respondent's Position

[67] The Respondent submits that the law on rational connection only requires the government to demonstrate that it is reasonable to suppose that the means adopted to further legislative objectives *may* do so, not whether they *will* in fact do so: *Alberta v. Hutterian Brethren Of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48. In that sense, this stage of the analysis is not particularly onerous: *Health Services*, at para. 148. The Respondent submits that the rational connection between limiting a work stoppage in the postal service and protecting third parties from the impact of such a stoppage is clear. The Attorney General urges this court to find that the continued delivery of mail services is rationally connected to the means adopted in the legislation, as was the case in *SFL*, including the sanctions imposed on employees and the Union to ensure compliance with the Act: see at para. 79.

[68] The provisions of the Act were logically linked to promoting settlement of the labour dispute and preventing irreparable social harm to vulnerable groups. The provisions of the Act which imposed sanctions for non-compliance were rationally connected to the basic structure of the legislation, just as the trial judge in *SFL* found, at para. 79.

[69] In respect of the pension solvency issue, the Respondent submits that the pension solvency provisions of the Act were rationally connected to the Crown's pressing and substantial objectives in that they were designed to protect taxpayers and to ensure the plan's sustainability for retiring employees. At the end of 2010, Canada Post had a solvency deficit of more than $3.2 billion: Tian-Teck Go Affidavit, Applicants' Record, Exhibit C, Volume 5, Tab 11(C), p. 1815. Due to Canada Post's status as a Crown corporation, taxpayers would ultimately be responsible for any unfunded liabilities should the employer become unable to meet its obligations to fund the plan.

The Applicants' Position

[70] In the Applicants' submission, the Attorney General has tendered no evidence that the means adopted by the government to meet its stated objectives were "carefully tailored" to those objectives, a requirement for justifying infringement of *Charter* rights: *Dunmore*, at para 54. In order to meet the test for rational connection, the government must prove that the restriction on the right serves its intended purpose: *RJR-MacDonald* at para. 153. The Applicants submit that the Act fails the rational connection test on the following grounds: it imposed salary increases

that were lower than what the employer had previously offered; it imposed an involuntary mechanism for resolving the labour dispute combined with arbitral criteria that were weighted heavily in favour of the employer; it imposed these provisions for a term of four years; it compelled and muzzled the free speech of postal workers; and it imposed penal sanctions for noncompliance with its provisions.

Minimal Impairment

The Respondent's Position

[71] The Respondent submits that the restrictions on strike activity imposed by the Act were minimally impairing. A government need not pursue the least drastic means of achieving its objective: *RJR-MacDonald Inc.*, at para. 160. Rather, the government action at issue must only fall within a range of reasonable alternatives: *Canada (Attorney General) v. JTI MacDonald Corp.*, [2007] 1 S.C.R. 429, at para. 43.

[72] The Act prohibited strike activity, but replaced it with a dispute-resolution mechanism that provided the parties with "strike-like" incentives to negotiate. The Act's reach was time-limited; it was confined to a single round of bargaining. It preserved collective bargaining while extending the terms of the previous collective agreement. The restrictions on strike activity provided for by the Act mirrored provisions in the *Canada Labour Code* which permit the Canada Industrial Relations Board to prohibit certain activities when declaring a strike or lockout to be unlawful: ss. 91, 92(3)(a)(vi), 100. The Act is distinguishable from the legislation declared unconstitutional in *SFL*, which provided no alternative mechanism to strike activity whatsoever: see at para. 25.

[73] The Respondent relies on the evidence of Trottier for the submission that the wage increases imposed by the Act were on par with rates recently negotiated by public sector bargaining units: Trottier Affidavit, Respondent's Record, Volume 1, Tab 4, p. 199, para. 12. Moreover, as the Federal Minister of Labour indicated during the Senate debates, the wage increase provisions did not prohibit cost-of-living adjustments over and above the statutory increases: Senate Debates at p. 202, Respondent's Book of Authorities, Volume 1, Tab 3. The four-year term of the agreement reflected the last offers tabled by both parties prior to the legislation being tabled.

[74] The Respondent answers the Applicants' objections to the FOS arbitration scheme as being an "all or nothing" approach by submitting that it is precisely the powerful incentive that FOS creates that makes it effective in bringing about a resolution to the dispute in question. Under FOS, the parties are motivated to adopt reasonable positions in the hope that theirs will be selected by the arbitrator. The cost of disagreement is higher than in conventional arbitration. This increases the likelihood of a freely negotiated settlement. The incentives created by FOS mimic the strike-lockout regime by putting pressure on the parties to negotiate. According to the evidence of Riddell, research indicates that the outcomes of FOS mirror those of strike and lockout-based regimes: Riddell Affidavit, Respondent's Record, Volume 1, Tab 5, pp. 212-215, paras. 43-45; Reply Affidavit of Riddell, Respondent's Record, Volume 2, Tab 10, p. 369, paras. 7-8.

[75] The arbitration criteria which the Applicants contend were weighted in favour of the employer were non-exhaustive. There was nothing preventing the arbitrator from considering factors other than those stipulated in the Act. Moreover, the Respondent submits, the criteria in the Act resemble those found in other legislation. The Applicants argue that the requirement that the arbitrator look to "comparable postal industries" in selecting the final offer was a reference to the courier industry, where starting wages are relatively low. However, in the Respondent's submission, the arbitrator was granted wide discretion to select comparator industries, of which the courier industry was only one.

[76] Central to the Respondent's position on minimal impairment is its submission that the Act closely resembled previous back-to-work legislation involving the postal service. The Act was virtually identical to the *Postal Service Continuation Act, 1997*, S.C. 1997, c. 34 [*PSCA*], subject to two exceptions: the slow and costly mediation-arbitration scheme imposed by the *PSCA* was replaced by a FOS model, and, in the 2011 Act, new arbitral criteria were added after the Minister met with the parties to address bargaining issues specifically in dispute in that round of bargaining.

The Applicants' Position

[77] The Applicants contend that the Act fails to meet the test for minimal impairment. The Act imposed a total ban on strike activity. The mechanism it substituted for workers' ability to strike was punitive and unfair. Although the Respondent argues that the restriction on strike activity was temporally limited, the Applicants argue that it occurred during a round of bargaining that was critical for the Union; the outcome of this round would influence the course of relations for a long time to come.

[78] Under the Act, the Minister of Labour was empowered to unilaterally appoint an arbitrator. The FOS process was unfair and inappropriate for the complex issues in dispute. The selection criteria that were to guide the arbitrator were biased toward the employer. In all, FOS was a process which, from the Union's perspective, was to be avoided at all costs. Wage increases were predetermined by the Act. Where matters which are normally bargainable are excluded from arbitration, the effectiveness of the bargaining process as a means of ensuring equal bargaining power in the absence of the freedom to strike is dubious: *Alberta Reference*, at para. 124, *per* Dickson C.J.

[79] If the government's legislative objectives were pressing and substantial, which the Applicants deny, it could have adopted less rights impairing means for advancing those objectives. It could have permitted rotating strikes while referring matters remaining in dispute to the Canada Industrial Relations Board. It could have permitted free negotiations on wages, the term of the collective agreement, and pensions. If negotiations failed, the Act could have provided for conventional binding arbitration, permitting the parties to have input into the nature of the arbitration process. Finally, if the government wished to ameliorate the detrimental impact of postal service interruption, it could have ordered its Crown Corporation to end the nation-wide lockout.

[80] As evidence of the range of less drastic options that were available to the government, the Applicants refer to the House of Commons Debates held prior to the enactment of the Act. CUPW and members of Parliament put forward amendments to the Bill that would have lessened its detrimental effects on postal workers' fundamental rights and freedoms, the Applicants submit. The amendments would have assisted in preserving the integrity of the collective bargaining process. Each of the proposed amendments was rejected. The Act passed with no amendments: Lemelin Affidavit, Applicants' Record, Volume 1, Tab 2, pp. 48-49, paras. 74-75; CUPW letters to J. Layton, Exhibit P, Applicants' Record, Volume 2, Tab 2P, pp. 406-408; House of Commons Debates, pp. 1097-1106.

Proportionality

The Respondent's Position

[81] The Respondent's position is that the detrimental impact of a prolonged interruption of postal services far outweighed any damaging impact suffered by CUPW as a consequence of the Act. Postal workers experienced a one-time inability to negotiate an increase in salary in excess of the statutory cap on wage rates. The substitution of FOS for the ability to strike was also temporary. The Act impacted postal workers for a period of four years. It prevented losses to the Canadian economy that would have been permanent. The impact on postal workers was attenuated by the imposition of wage limits which were consistent with wages previously bargained for in the wider public service.

The Applicants' Position

[82] The Applicants submit that the deleterious impact the Act had on postal workers outweighs its salutary effects. The Act eliminated the right of postal workers to strike during a pivotal round of bargaining. It imposed a punitive, biased and unfair dispute resolution mechanism, forcing the Union to accede to a collective agreement that rolled back decades of hard-won rights and benefits. The Act unilaterally legislated collective bargaining outcomes, exacerbating postal workers' loss of bargaining power. More broadly, the Act had a "chilling effect" on workers exercising their right to lawfully strike to improve their working conditions. The legislation undermined the integrity of the statutory collective bargaining process as a whole. Meanwhile, the salutary effects of the legislation were negligible; the Act merely put a stop to the temporary inconvenience of reduced mail service.

2) *Did the Act unjustifiably violate the guarantee of freedom of expression under s. 2(b) of the Charter?*

[83] Section 2(b) the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> [...]

(b) freedom of expression.

The Applicants' Position

[84] The Applicants bear the onus of establishing a *prima facie* violation of their freedom of expression guarantee under the *Charter*. The Applicants take the position that the Act violated postal workers' freedom of expression, and that this violation was not justified under s. 1 of the *Charter*. It did so in three ways: by prohibiting workers' ability to strike and to undertake related activities; by compelling speech by virtue of the requirement that Union leadership communicate to members the obligation that they must resume their duties; and by imposing penal sanctions for non-compliance with these provisions.

[85] The Applicants' submission is that strike activity is inherently expressive, and that it falls squarely within the scope of s. 2(b) protection. In the labour context, expressive freedom is critically important. In *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 41*, 2013 SCC 62, [2013] 3 S.C.R. 733, at para. 31, the court adopted the language of McLachlin C.J. and LeBel J. in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156 [*Pepsi-Cola*], at para. 34, where they explain the significance to workers of expression on the conditions of their labour: "Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life."

[86] The fact that the strike is also associational does not remove it from the scope of s. 2(b) protection. The collective withdrawal of labour, not merely activities related to it, is inherently expressive. The expression of postal workers and the Union in this case serves the core values underlying the s. 2(b) guarantee set out at para. 32 of *Pepsi-Cola*: self-fulfillment, participation in social and political decision-making, and the communal exchange of ideas. The Act's prohibition on strike activity also made picketing, an activity with recognized s. 2(b) protection, unlawful, as the *Canada Labour Code* defines a "strike" as "a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output": see s. 3(1).

The Respondent's Position

[87] The Respondent argues that it is inappropriate to analyze the right to strike under freedom of expression. Historically, the Respondent submits, the courts have preferred to analyze the issue of the right to strike under s. 2(d). Freedom of expression is an individual right, not a collective one, and the relevant right in this case is associational in nature.

[88] The view of the Respondent is that there is nothing inherently communicative in the withdrawal of labour. Meaning may be conveyed through activities that accompany such a withdrawal, but it is not conveyed through the cessation of work itself. The Act did not prohibit expressive activities related to striking. Picketing continued during and after the 2011 service disruption; this garnered the Union positive media coverage and public support for its agenda.

[89] The Respondent argues that ss. 2(b) and 2(d) of the *Charter* have different thresholds for violation: respectively, they are mere and substantial interference with the protected freedoms. If limitations on strike activity could be declared unconstitutional under the rubric of freedom of expression, it would arguably never be necessary to resort to a s. 2(d) analysis. This would be an absurd result. The differing threshold analyses for these rights demonstrate that strike activity ought to be viewed as inherently associational rather than expressive.

a) Did the Act restrict expressive content that was not excluded from protection by either the method or location of the expression, and did this restriction arise from the purpose or the effect of the legislation?

The Applicants' Position

[90] The Applicants and the Respondent agree on the elements of the test for a s. 2(b) infringement. The Applicants argue that in order to exclude an expressive activity from the scope of s. 2(b) protection on the basis of its method or location, a court must find that the expressive activity conflicts with the values protected by the guarantee, namely self-fulfillment, democratic discourse and truth-finding: *Montréal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, at para. 72. Neither the method nor the location of the expressive activity in this case removes it from the scope of s. 2(b) protection, the Applicants submit. The method of expression in the circumstances of this case was peaceful and non-violent. The relevant locations were city sidewalks and public spaces adjacent to the employer's facilities and headquarters, spaces that have a long history of being important for free public expression: *Pepsi-Cola*, at para. 30 and *Montréal (City)*.

[91] In the Applicants' submission, the Act restricted strike expression both in purpose and effect. The nature of the infringement was threefold: the Act compelled postal workers to end their work stoppage and return to work (s. 3(b)); it compelled speech by requiring union members to "refrain from any conduct that may encourage employees not to comply" with the Act (s. 5); and it prohibited all strike activity during the extended term of the collective agreement subject to criminal sanctions (ss. 7(b) and (c) and 18).

The Respondent's Position

[92] The Respondent asserts that the provisions of the Act that prohibited Union officials from encouraging non-compliance with the Act were not principally aimed at restricting expression. To the extent that the Act restricted expression, the government's target was not the expression itself, but its "physical consequences"; a critical distinction drawn by the court in *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927. As such, the Applicants must demonstrate that the proscribed activity promoted one of the principles underlying the freedom of expression guarantee: truth-seeking, participation in social and political decision-making, and individual self-fulfillment. There is no suggestion, in the Respondent's view, that the expressive activity in this case falls under one or more of these protected purposes. Therefore, the Respondent submits, the s. 2(b) claim does not pass the threshold stage of the analysis and it must fail.

b) If there was a violation, was it justified under s. 1?

[93] The onus lies with the Respondent to demonstrate that if a *prima facie* violation of a *Charter* right is found to exist, the violation was justified.

The Respondent's Position

[94] In the Respondent's submission, any infringement on postal workers' freedom of expression was justified. The objectives of the Act were pressing and substantial; the objective and the means chosen to attain it were rationally connected; the impugned provisions were minimally impairing; and there was proportionality between the objective and the measures adopted: *Oakes*, pp. 138-140.

Pressing and Substantial Objective

[95] Canada's submissions on the objectives of the Act are set out in detail in the freedom of association analysis above.

Rational Connection

[96] The Respondent adopts the position that the provisions of the Act which the Applicants impugn for restricting postal workers' free expression are rationally connected to the objectives set out above.

Minimal Impairment

[97] In the Respondent's view, the provisions of the Act were minimally impairing of the Applicants' fundamental freedoms. The Respondent advances the argument that while the Act required postal workers to resume their duties, it did not prohibit them from freely expressing their views by engaging in picketing, leafleting, and other measures to raise awareness of the issues at stake in the bargaining process. Under cross-examination, Lemelin testified that after enactment, picketing by the Union continued, although the focus of the messaging shifted to the Union's legal challenge to the appointment of an arbitrator (Lemelin Cross, Respondent's Record, Volume 3, Tab 14, pp. 844-845). CUPW's communication with its membership through its website, fax broadcasts, news releases, press conferences, video blogs, mainstream and social media continued during and after the strike and lockout.

The Applicants' Position

[98] The Applicants advance the position that the infringement of postal workers' freedom of association was not justified under s. 1. They respond to the government's s. 1 arguments in detail under the freedom of association analysis above. However, the Applicants' specifically counter the Attorney General's submission that any infringement of the Applicants' freedom of expression was minimally impairing because strike-related expressive activity was allowed to continue after the Act came into force. In the Applicants' submission, this assertion is false. Forming a picket line is unlawful in circumstances where a collective agreement has been

reinstated. That occurred in this case, as s. 6 of the Act extended the terms of the previous collective agreement during the interim between the old and the new agreements.

3) What is the appropriate remedy in this case?

[99] On the third day of the hearing of this matter, the parties filed a consent agreement with the court on the issue of remedy. Remedial issues remaining after a decision on the merits would be addressed through written and oral submissions, the parties agreed, if any of them requested this.

[100] The issues on remedy to be determined at this stage are the application of s. 52 of the *Constitution Act, 1982* and the availability of s. 24(1) *Charter* damages.

a) Should a retroactive remedy be awarded?

The Respondent's Position

[101] The Respondent takes the position that, in the event this court decides to award declaratory relief, the declaration should be made effective to no earlier than January 30, 2015. The Respondent relies on *Canada v. Hislop*, [2007] 1 S.C.R. 429 [*Hislop*], at para. 99, for the proposition that, where the Supreme Court of Canada departs from its own jurisprudence by overruling a prior decision, thereby effecting a substantial change in the law, purely prospective remedies are appropriate. January 30, 2015 is the date on which the *SFL* decision was released. In it, the Supreme Court of Canada effectively overturned the 1987 *Labour Trilogy*, finding for the first time that a right to strike is protected under s. 2(d) of the *Charter*.

[102] The Respondent submits that an award of a prospective declaration would afford the Applicants with a meaningful remedy because it would have a wider impact in future cases. Future negotiations could address losses that occurred as a result of the Act. A retroactive remedy, however, would interfere with the role of governments to make decisions concerning the delicate balance involved in labour relations.

The Applicants' Position

[103] The Applicants reject the Respondent's argument that retroactive relief is not appropriate in this case. The Applicants agree that the relevant authority is the *Hislop* case, where the Supreme Court of Canada set out five principles for limiting the retroactive effect of a remedy: (i) whether there has been a substantial change in the law; (ii) the government's reasonable reliance on the jurisprudence; (iii) whether the government acted in good faith; (iv) fairness to litigants; and (v) whether a retroactive remedy would interfere with Parliament's role in distributing limited resources: see at paras. 110-118.

[104] With respect to the first *Hislop* factor, the Applicants agree that a substantial change in the law has occurred, but contest the date at which the change took place. Rather than fixing the date at the release of the *SFL* case in January 2015, the Applicants assert that the change in the

law occurred at the release of the *Health Services* decision, in June 2007. *Health Services*, they submit, vindicated Dickson C.J.'s dissent in the *Alberta Reference*. In *Dunmore*, *Health Services* and *Fraser*, the Supreme Court of Canada adopted a more expansive and purposive interpretation of s. 2(d).

[105] With respect to the second factor, the Applicants argue that the government knew when it passed the Act that a change in the law had occurred. The punitive nature of the Act demonstrates that the government did not act in good faith.

[106] As for the third factor in *Hislop*, a purely prospective remedy would not result in fairness to the parties, in the view of the Applicants. It is not fair to the affected workers for a declaration to reach only into the future when the government acted so arbitrarily.

[107] The Applicants suggest that a retroactive remedy in this case would not unduly interfere with the role of Parliament.

Should declaratory relief under s. 52 of The Constitution Act, 1982 be awarded in conjunction with s. 24(1) Charter damages?

The Respondent's Position

[108] The Respondent argues that a s. 24(1) *Charter* remedy should not be awarded in this case. It is only in rare and exceptional circumstances that a court will issue a declaration of invalidity under s. 52 of *The Constitution Act, 1982* in combination with an individual remedy under s. 24(1) of the *Charter*. The Applicants have not made out their entitlement to each of these remedies.

[109] Sections 52 and 24(1) have distinct remedial objectives: *R. v. Ferguson*, [2008] 1 S.C.R. 96 [*Ferguson*]. It is critical to inquire as to whether *Charter* infringement results from the impugned statute itself or from the acts or omissions of government officials. If the infringement arises from the impugned statute, a declaration of invalidity under s. 52 is the appropriate remedy. If the infringement arises from the acts or omissions of government officials, a personal remedy may be granted under s. 24(1).

[110] Personal remedies can include declarations and damage awards, but they do not disturb statutes themselves. Statutes remain in effect. As the court states in *Ferguson*, s. 24(1) remedies may be awarded in conjunction with s. 52 relief, but only where necessary to provide the claimant with an effective remedy. In this case, as in *Ciarlariello v. Schacter*, [1992] 2 S.C.R. 679, if the impugned provisions of the Act were to be struck down, that should end the matter; no s. 24(1) remedy should be available. This is not an unusual case where both remedies should be granted.

The Applicants' Position

[111] The Applicants submit that a s. 24(1) *Charter* remedy is necessary in the circumstances of this case, where the government has passed a reprisal law. The court should send Parliament a clear message that in exercising its powers, it cannot penalize citizens for exercising their constitutional freedoms. A declaration is important to CUPW and to workers across the country. A focused s. 24(1) remedy is also necessary to provide the workers directly affected by the Act with a meaningful remedy.

VI. CONSTITUTIONAL BACKDROP

[112] The present application comes before the courts during a watershed period in the freedom of association jurisprudence. In January 2015, the Supreme Court of Canada released a trilogy of cases: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, 1 S.C.R. 3 [*MPAO*]; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, 1 S.C.R. 125 [*Meredith*]; and *Saskatchewan Federation of Labour v. Saskatchewan* [*SFL*], 2015 SCC 4, 1 S.C.R. 245. *SFL* was a historic ruling. In *SFL*, the Supreme Court observed that the jurisprudential arc which began with the dissent in the *Alberta Reference*, and which encompassed the *Health Services* decision, "bends increasingly towards workplace justice." Accordingly, the Supreme Court of Canada found that s. 2(d) protection extends to strike activity. Echoing the words of the trial judge, the majority in *SFL* declared, at para. 25, that without a right to strike, "a constitutionalized right to bargain collectively is meaningless."

[113] At the beginning of the arc delineated and articulated by Abella J. in *SFL* stands the *Alberta Reference*. The dissenting opinion of Dickson C.J. in the *Alberta Reference* makes a very significant contribution to Abella J.'s majority decision in *SFL*. The *Alberta Reference* concerned the constitutionality of prohibiting the use of strikes and replacing them with compulsory arbitration. In his dissent, Dickson C.J. articulated the purpose of s. 2(d) as "protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society": para. 22. At para. 23, Dickson C.J. spoke of the importance of freedom of association in the labour context: "Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions."

[114] The Chief Justice went on to address whether the right to strike was excluded from the scope of s. 2(d) protection. He rejected what he terms the "constitutive" approach to interpretation of the fundamental freedom, which restricted it merely to the right to form associations to pursue collective goals. The constitutive approach is an essentially formalistic one, and Dickson C.J. viewed it as "legalistic, ungenerous, indeed vapid" (at para. 81).

[115] He stated further, at para. 84, that: "the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms." The purpose of s. 2(d), for Dickson C.J., is "to protect the individual from state-enforced isolation": para. 86. The right to strike is qualitatively different from the individual cessation of labour; there is no individual equivalent to the right to strike: para. 89.

[116] Chief Justice Dickson's analysis under s. 1 in the *Alberta Reference* offers insight into the issues in this application. When determining whether a legislative objective is pressing and substantial, Dickson C.J. wrote, at para. 105: "It is the actual objectives of the Alberta Legislature and not some other legitimate but hypothetical objectives for passing the particular statutes in question that must be scrutinized." Dickson C.J. found that a total prohibition on strike activity in hospital employment was too drastic a measure, but he stated at para. 117 that: "If prohibition of strikes is to be the least drastic means of achieving this purpose it must, in my view, be accompanied by adequate guarantees for safeguarding workers' interests."

[117] He also found at para. 123 that the exclusion of subjects from the arbitration process "compromises the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration."

[118] In addition to Dickson C.J.'s dissent in the *Alberta Reference*, there are other antecedents of *SFL*. Several key rulings from the Court in the late 1990s and 2000s opened the door for the recognition of the right to collective bargaining and the right to strike. The decision in *Dunmore v. Ontario*, 2001 SCC 94, [2001] 3 S.C.R. 1016 [*Dunmore*], laid the groundwork for a more expansive conception of the freedom of association. In that case, the court declared unconstitutional the provisions of Ontario's *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A. That statute excluded agricultural workers, a precarious and vulnerable part of the province's workforce, from the statutory labour relations scheme by preventing them from joining statutorily-protected labour associations. The court found that where a legislature takes a positive action to create such a scheme, it has a positive duty to ensure that no sector of vulnerable workers is expressly excluded. That is, when a lack of legislative protection leads to substantial interference with the ability of vulnerable workers to freely associate, a violation of s. 2(d) may be made out. The freedom to associate becomes meaningless in the absence of a duty on the part of the state to take such positive steps.

[119] In a significant shift from its past position, the court held that pure judicial restraint in the field of labour relations will expose most workers to unfair labour practices. The complete exclusion of a particularly vulnerable occupational group from the legislative scheme weakens the case for deference to the legislature. In a notable break from the individualist emphasis of associational rights defined in the majority reasons in the *Labour Trilogy* of cases, in *Dunmore* the court held that particular union activities, although inconceivable on the individual level, may be central to freedom of association. At para. 17, the majority held that "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning." In *Dunmore*, the court only recognized a handful of union activities as warranting s. 2(d) protection, but the underlying logic of this decision opened the door to the recognition of other collective activities, such as collective bargaining and strikes.

[120] Six years after *Dunmore* was decided, the Supreme Court of Canada had occasion once again to consider the inclusion of collective bargaining rights in the scope of s. 2(d) of the *Charter*. The decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v.*

British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*], represented a notable shift in the freedom of association jurisprudence. The court in *Health Services* rejected the reasoning in the 1987 *Labour Trilogy* majority rulings that denied constitutional protection to collective bargaining activities, and it left open the possibility that a right to strike, too, might deserve *Charter* protection. *Health Services* was a significant development in the court's new perspective on statutory labour relations regimes that had had its inception in *Dunmore*.

[121] In *Health Services*, the government of British Columbia had legislated the override of provisions in the collective agreements of health care workers in order to promote the sustainability of the provincial health care system. The legislation was enacted with no prior consultation of the workers affected. When workers were instructed that a one-day work stoppage in protest of the legislation would be unlawful, the union turned to the courts for redress, launching a *Charter* challenge to the legislation in the British Columbia courts and complaining to the ILO. When the appeal reached the Supreme Court of Canada, the court held the legislation to be unconstitutional on the grounds that it was not minimally impairing of the associational rights of workers. The failure to consult with affected unions was fatal to the British Columbia legislature's infringement of the *Charter*.

[122] The court in *Health Services* rebutted the view taken by the majority in the 1987 *Trilogy*. Chief Justice McLachlin and LeBel J. reviewed the reasons of the majority, making powerful statements on judicial deference to labour relations precedents. Not only did such a stance ignore history, but it took "an overbroad view of judicial deference": para. 26. In response to the view that freedom of association is an inherently individualized right, the court in *Health Services* declared that certain activities have no individual analogue and are deserving of protection: para. 28.

[123] The court then traced the historical development of the jurisprudence on labour relations in an effort to demonstrate that collective bargaining pre-dates modern statutory labour relations regimes. The majority emphasized that the right of workers to collectively bargain affirms the *Charter* values of dignity, personal autonomy, equality, and democracy: para. 34. The court was careful to specify that s. 2(d) does not protect all aspects of collective bargaining. Rather, it prohibits "substantial interference" by the state in associational activity. The right to collective bargaining is limited in that it does not extend to "a certain substantive or economic outcome": para. 91. The threshold implied by the term "substantial" interference is directed not only at "the attainment of a union's objectives (which is not protected) but with *the very process* that enables them to pursue these objectives": para. 91 [emphasis added].

[124] The context for the legislation in *Health Services* involved increasing demand for health care services in British Columbia and increasing costs associated with the delivery of those services. The Attorney General for British Columbia characterized the situation as a "crisis of sustainability": para 4. The legislation enacted by the province proposed to deal with these circumstances without resorting to wage reductions for health care workers. It did so by restructuring service delivery through the reorganization of the administration of the labour force. The impugned provisions dealt with, among other things, contracting-out and job security. The legislation invalidated portions of existing and future collective agreements, and prohibited

workers and management from contracting-out of the restrictions it contained. The statute passed quickly, without prior consultation with affected unions.

[125] The Supreme Court of Canada found in favour of the health care unions. In finding that s. 2(d) protects a right to collective bargaining, the court did not extend protection to "collective bargaining" as the term is understood in statutory labour relations regimes. Rather, it granted constitutional protection to "a process of collective action to achieve workplace goals": para. 19. At para. 22, the majority held that the exclusion of collective bargaining from the ambit of s. 2(d) of the *Charter* no longer withstood principled scrutiny. One by one, McLachlin C.J. and LeBel J. considered and dispensed with the five principles set forth by McIntyre J. to justify the exclusion of collective bargaining from the scope of *Charter* protection in the original *Labour Trilogy*.

[126] Crucial to the finding that s. 2(d) protects collective bargaining, at para. 67 of the majority's reasons, is evidence from the Parliamentary hearings that took place before the *Charter* was enacted. During those debates, an amendment was proposed to have the freedom to organize and bargain expressly included in s. 2(d). This proposal was rejected because these rights were thought to be implicit in the words "freedom of association."

[127] At paras. 90 *et seq.* of *Health Services*, the majority's opinion expands on what is meant by the term "substantial interference with collective bargaining." The term refers to state action that targets or affects associational activities, thereby discouraging the collective pursuit of common goals. This requires employers and employees to meet and bargain in good faith in pursuit of a common goal of peaceful and productive accommodation. Thus, the right to collective bargaining is a limited right. Interference with the right must obstruct the very process that enables union members to pursue their objectives. The objectives themselves, increased wages, for example, are not afforded protection. The substantial interference test involves two inquiries. First, what is the importance of the matter affected to the process of collective bargaining and to the capacity of union members to come together to pursue collective goals in concert? Second, does the measure preserve good faith negotiation and consultation? Substantial interference must be determined contextually: para. 109.

[128] The majority, at para. 96, provides some guidance as to what would constitute a violation of s. 2(d) for substantially interfering with collective bargaining: "Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements."

[129] The jurisprudential arc described by Abella J. also encompasses *Meredith* and *MPAO*. *MPAO* considered the constitutionality of the non-unionized labour relations regime to which members of the RCMP are subject. The nature of the scheme is that employee representatives and management consult on human resources policies with the understanding that the final word always rests with management. In a prior challenge to this scheme, in *Deslisle v. Canada (Attorney General)*, [1999] 2 S.C.R. 989, the Supreme Court of Canada upheld its constitutionality. On this appeal, the Supreme Court found that the RCMP members, as a class,

were unjustifiably excluded from the public sector labour relations scheme in order to prevent them from exercising their freedom to associate. The court found that the infringement of their s. 2(d) rights could not be justified under s. 1, because the infringing measures were not rationally connected to the objective of maintaining an independent and objective police force.

[130] In *MPAO*, the court clarified key aspects of the freedom of association. First, at para. 66, the court held that, viewed purposively, s. 2(d) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others to pursue other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. Second, at para. 79, the court found that collective bargaining is not a "derivative right" that is protected only if state action makes it effectively impossible to associate for workplace matters. Collective bargaining does not, however, guarantee particular bargaining outcomes or a particular model of labour relations: para. 67. Third, central to the court's determination of whether a s. 2(d) violation exists is whether the measures at issue disrupt the balance between employees and employers that the *Charter* seeks to achieve: para. 216.

[131] In *Meredith*, the Supreme Court of Canada considered whether the rollback of scheduled wage increases for RCMP members without prior consultation violated s. 2(d) of the *Charter*. The reasons of the majority were delivered by McLachlin C.J. and LeBel J. The legislation that imposed the rollbacks did not violate RCMP members' freedom of association. The wage limits were time-limited, shared by all public servants, and did not permanently remove the subject of wages from collective bargaining: para. 27. They were consistent with rates reached in comparable agreements concluded elsewhere in the public administration; consultation on other issues related to compensation was not precluded: para. 28. Ultimately, the government's retrenchment of statutory wage rates did not substantially impair the collective pursuit of workplace goals by RCMP members: para. 30. As the court found no violation of s. 2(d), it did not address the question of justification under s.1.

[132] *SFL* addressed the constitutionality of two statutes enacted by the Saskatchewan legislature in 2008: the *Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), and *The Trade Union Amendment Act*, 2008, S.S. 2008, c. 26. The former statute limited the ability of public sector workers to strike, while the latter introduced restrictions to the union certification process. The Supreme Court of Canada held that *PSESA* substantially interfered with a meaningful process of collective bargaining, and therefore violated s. 2(d) of the *Charter of Rights and Freedoms*. The court held that this interference was not justified under s. 1 of the *Charter*.

[133] Justice Ball of the Saskatchewan Court of Queen's Bench heard the Saskatchewan Federation of Labour's challenge to the impugned legislation in July 2008. Justice Ball ruled that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter*. He found that the *PSESA*'s prohibition on the right of public sector workers to strike substantially interfered with their s. 2(d) rights. Notably, he held that good faith negotiation in determining the designation of essential services was not possible under the *PSESA*, because one side, the employer, had the capacity to impose an agreement if negotiations broke down. In Ball J.'s view, (adopted by the

majority of the Supreme Court at para. 24 of its reasons in *SFL*), "without the right to strike, a constitutionalized right to bargain collectively is meaningless."

[134] Justice Ball dismissed the challenge against the second statutory scheme, *The Trade Union Amendment Act*, holding that that s. 2(d) does not require the enactment of legislation that ensures that unions succeed easily in their efforts to be certified.

[135] The government of Saskatchewan appealed Ball J.'s ruling to the Court of Appeal for Saskatchewan. That court unanimously allowed the government's appeal with respect to the constitutionality of the *PSESA*, ruling that the freedom of association jurisprudence had not shifted far enough, or clearly enough, to warrant a finding that the right to strike is protected by s. 2(d) of the *Charter*. The Court of Appeal left the trial judge's ruling with respect to the second statute undisturbed.

[136] The Saskatchewan Federation of Labour subsequently appealed the Court of Appeal's ruling on both statutes to the Supreme Court of Canada. The majority opinion in *SFL* was delivered by Abella J. on behalf of McLachlin C.J. and LeBel, Abella, Cromwell and Karakatsanis JJ.

[137] The majority of the Supreme Court found that the right to strike is an indispensable component of collective bargaining. The withdrawal of services plays a crucial role in this constitutionally-protected process. Collective action to refuse work allows workers to participate directly in the process of determining the conditions that will govern their working lives. This right affirms workers' dignity and autonomy: para. 54.

[138] The s. 2(d) jurisprudence has gradually expanded the scope of the freedom to associate in the labour context. The majority identified two distinct periods in the development of the freedom of association jurisprudence: a restrictive era, followed by a more generous and purposive approach to the freedom of association guarantee (*SFL* at para. 30). At para. 33, the court adopted the conclusion of Dickson C.J. in the *Alberta Reference*, p. 371, that "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw ... their services [collectively], subject to s. 1 of the *Charter*."

[139] The right to strike promotes equality in the bargaining process between workers and employees, a relationship that is structured by long-recognized and deep inequalities. Justice Abella recounted the historic criminalization of strike activity in 19th century England and its eventual decriminalization. She traced the adoption in Canada of the Wagner model of labour relations, which represents an alternative to striking as a means to achieve industrial peace. The model is characterized by statutorily protected bargaining rights, including: (a) a union certification procedure that enables employees to obtain union representation through democratic means and that imposes on employers a duty to recognize and bargain in good faith with unions; (b) the postponement of strikes until after conciliation; and (c) a prohibition on employers terminating the contract of employment merely because the worker is on strike (para. 44).

[140] The Wagner model of labour relations, upon which legislative schemes in Canada are built, is intended to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining. Strike action is a necessary means to ensure industrial and social peace. It places pressure on both sides in labour disputes to engage in meaningful negotiations. The right to strike is the irreducible minimum of the freedom of association in Canadian labour relations.

[141] The test to be applied in determining whether there has been a s. 2(d) violation, set out by the *SFL* court beginning at para. 77, is whether the legislative interference with the right to strike amounts to a substantial interference with a meaningful process of collective bargaining.

[142] The court held that the infringement of s. 2(d) on the facts of *SFL* was not justified. The means chosen by the government to maintain essential public services, a pressing and substantial legislative objective, were not carefully tailored to be minimally impairing.

[143] The court addressed the definition of an "essential service" for the purpose of limiting the right to strike. At para. 11, it noted that under the *PSESA*, "[i]n the event that [negotiations to create an "essential services agreement"] break down, the public employer has the authority to unilaterally designate, by 'notice' which public services it considers to be essential". At para. 84, the majority affirmed Dickson C.J.'s holding in the *Alberta Reference*, p. 375, that "*[m]ere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike*" (emphasis in original). The court concluded, at para. 85, that "the fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered 'essential'."

[144] The provisions of the *PSESA* were held to go beyond what was reasonably required to ensure the uninterrupted delivery of essential services during a strike because:

- The statute gave the employer the unilateral authority to determine the classification, number and names of employees who had to continue to work during a stoppage;
- Only select provisions were subject to review by the Labour Board, leaving no adequate review mechanism; and,
- There was an absence of a meaningful dispute resolution mechanism such that strike action was limited in a way that substantially interfered with a meaningful process of collective bargaining.

[145] The majority of the court, viewing these provisions in light of the s. 2(d) guarantee, held "[w]here the strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations" (para. 25). The court concluded, at para. 91, that "[r]equiring those affected employees to perform essential and non-essential work during a strike action undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals."

[146] In light of its finding that *PSESA* was unconstitutional for unjustifiably violating s. 2(d) of the *Charter*, the court concluded that it was unnecessary to realign its arguments under s. 2(b).

Thus it did not engage with the Saskatchewan Federation of Labour's alternative argument that the impugned legislation interfered with the freedom of expression of public sector employees. The court also rejected the Federation's appeal regarding the constitutionality of the second statute, *The Trade Union Amendment Act*. In a manner similar to the trial judge, the court held that this legislation did not substantially interfere with s. 2(d) by curtailing the freedom to create or join associations.

VII. FACTUAL BACKDROP

[147] The collective bargaining process that is the subject of the current litigation was triggered in the fall of 2010 in anticipation of the expiry of the outgoing collective agreement between CUPW and Canada Post – the Urban Postal Operations collective agreement – on January 31, 2011. Accordingly, the Union ratified a program of demands for the upcoming round of bargaining and then served Canada Post with a Notice to Bargain on October 4, 2010; this notice formally triggered the collective bargaining process.

[148] The parties met at various intervals over the next three months to negotiate at the main bargaining table and at various issue-specific "side tables." In early 2011, the parties remained at loggerheads on some important issues, including wages, pensions, and sick leave. Accordingly, the Union filed a Notice of Dispute with the federal Minister of Labour on January 21, 2011. The effect of this notice was to invoke the conciliation process under the *Canada Labour Code*.

[149] Pursuant to the conciliation process under the *Canada Labour Code*, the Minister appointed a conciliation officer to assist the parties in their negotiations. The parties met with the conciliation officer in February and March 2011. With his assistance, they agreed on March 11, 2011 to ensure the delivery of social assistance and other government cheques in the event of strike action by union members. The conciliation officer was unable, however, to resolve the differences between the parties.

[150] On March 15, 2011, Canada Post proposed a four year agreement. Its main terms included: wage increases of 1.5% for four years; $18 per hour for new hires, with a seven year scale to reach a maximum of $24.75 per hour; a defined benefit pension plan with an early retirement ratio of age 65/2 or 60/30 years of service; in the alternative to the defined benefit plan, a defined contribution plan for new hires, together with indexation reductions; employees were to be entitled to seven days of sick leave under a short-term disability plan.

[151] In late March and April, union members overwhelmingly voted to give union leadership a strike mandate. Notwithstanding this process, on April 1 the parties agreed to extend the conciliation process to May 3. The conciliation officer met with the parties several times during this period to no avail. The conciliation process ended on May 3 without a collective agreement.

[152] On May 5, the Minister appointed the conciliation officer in a new capacity, as mediator. In this capacity, he met with the parties each day from May 5 to May 30.

[153] On May 17, Canada Post made another proposal for a four year agreement. From the Union's point of view, some of the terms in this offer were more favourable: Canada Post now proposed wage increases of 1.75%, 1.75%, 1.9%, and 2% over the term of the agreement, and it withdrew its defined contribution plan and indexation reduction proposals.

[154] CUPW made its own proposal on May 22. It proposed wage increases of 3.3%, 2.75%, 2.75%, and 2.75% over the term of an agreement of three and a half years. CUPW rejected the remainder of Canada Post's May 17 proposal. A particular concern for the union was Canada Post's proposal to replace the existing sick leave system with a short-term disability scheme.

[155] Canada Post responded with a revised offer on May 24, proposing wage increases of 1.9%, 1.9%, 1.9%, and 2% over the course of a four year agreement. The "cooling-off" period, as defined under the *Canada Labour Code*, expired on May 25, without an agreement between the parties. The parties acquired the legal right to strike or lockout (respectively) as of 1:00 am on May 25.

[156] On May 30, CUPW made a "final offer," with the same proposed wage increases as its May 22 offer, this time for a four year term rather than one for three and a half years. CUPW rejected the rest of Canada Post's proposals and gave notice that, if its offer was not accepted, it would begin strike action on June 2. Canada Post rejected CUPW's offer on May 31.

[157] Also on May 31, the Federal Minister of Labour met with the parties for the first time. She took account of the outstanding issues and encouraged the parties to reach an agreement, suggesting that they attempt voluntary arbitration. The Minister met with the parties again on June 1 and June 2.

[158] On June 1, Canada Post proposed a four year agreement with the same wage increases as its proposal of May 24. It improved its proposed starting wage for new hires to $19 per hour. On the issue of short-term disability, Canada Post proposed referring its proposal to a working group for 18 months, plus six months of interest arbitration if there was no agreement on the terms of the new plan. This proposal envisaged a decision on the short-term disability issue in July 2013, with implementation to start in January 2014.

[159] On June 2, CUPW commenced a rotating strike action in Winnipeg, Manitoba. This was the prelude to two-day strikes in Hamilton, Ontario and Red Deer, Alberta, and one-day strikes in a host of cities and smaller municipalities over the next weeks. Throughout this period, postal workers delivered government cheques in conformity with the agreement between Canada Post and CUPW of March 11.

[160] CUPW made a proposal on June 3 comprising wage increases of 3.3%, 2.75%, 2.75%, and 2.75% over the term of a four year agreement. Like the Canada Post offer of June 1, it proposed sending the short-term disability issue to a working group with the significant distinction, however, that there was to be no guarantee of implementation.

[161] On June 6, Canada Post made a proposal that was substantially the same as its June 1 offer.

[162] On June 8, Canada Post announced that it would be reducing its mail service to three days per week, beginning on June 13, because of CUPW's rotating strikes.

[163] On June 9, CUPW made a proposal for a four year term that replicated both the proposed wage increases in its June 3 offer, and its June 3 proposals on the short-term disability issue. On the issue of pensions, CUPW proposed that the parties study the issue for one year and implement what had been agreed upon at that point.

[164] Also on June 9, Canada Post made a counter-proposal that essentially replicated the terms of its June 6 proposal, with the modification that the implementation of the short-term disability decision should now be January 2012 rather than January 2014.

[165] The Minister met with the parties again on June 10, and requested a suspension both of Canada Post's service reduction measures and CUPW's rotating strikes.

[166] On June 15, Canada Post declared a national lockout. On the same day, the Minister announced that the government would be introducing back-to-work legislation.

[167] The back-to work legislation, Bill C-6, was introduced and given a first reading in the House of Commons on June 20.

[168] The next day, June 21, CUPW proposed terms that significantly attenuated its previous wage demands, bringing them more closely into line with Canada Post's proposals of June 9. On June 21, CUPW proposed wage increases of 1.9%, 1.9%, 1.9%, and 2% over the term of a four year agreement, together with a starting wage of $19.50 per hour for new hires, with a six-year scale to reach the maximum wage. On the issue of short-term disability, however, CUPW proposed that, if no agreement could be reached after consideration by the working group, the issue should be submitted to arbitration without any timelines.

[169] Canada Post responded with a counter-offer on June 22 which contained many of the same proposals, with the difference that implementation of the short term disability plan should begin in January 2012.

[170] CUPW rejected the Canada Post offer of June 22 on the same day. Three days later, however, CUPW inquired whether Canada Post's most recent offer of June 22 was still on the table. They were told it was not.

[171] As the Bill made its way through the House of Commons, amendments were proposed to its FOS process, and to the criteria governing the appointment of an arbitrator. These proposed amendments did not attain the requisite support in the House. The Bill passed, without amendments, in the House of Commons on June 25, and in the Senate on June 26, on which date it was given Royal Assent. The new legislation mandated that any new collective agreement

should have a term of four years and that it would have wage increases of 1.75%, 1.5%, 2%, and 2% over the term of the agreement.

[172] The new legislation, *The Restoring Mail Delivery for Canadians Act*, required CUPW employees to return to work without delay and prohibited further lockouts and strikes for the term of new collective agreement. CUPW's rotating strikes were at an end. The Act contemplated continued negotiation and collective bargaining between the parties, but also provided that, if the parties could not agree, an arbitrator would arbitrate the dispute guided by criteria prescribed in the legislation and using the aforementioned mechanism of Final Offer Selection (FOS). The Act also provided that the arbitrator would be a ministerial appointee.

[173] Under s. 8 of the Act, the Minister appointed a FOS arbitrator on July 22, 2011. CUPW sought recourse in the Federal Court, seeking to quash that appointment on the basis that the Minister ignored two essential qualifications when appointing the arbitrator: bilingual ability and expertise in the field of labour relations. On October 20, 2011, the Federal Court ordered a stay of proceedings before the arbitrator, until a final determination could be made on CUPW's application for judicial review. The arbitrator resigned on November 1, 2011.

[174] The Federal Court in January 2012 ruled on the scope of the Minister's discretion under the Act. The Court quashed the arbitral appointment of July 22: *Canadian Union of Postal Workers v. Canada Post Corp.*, 2012 FC 110, [2012] F.C.J. No. 199, at para. 28.

[175] A new arbitrator was appointed on March 13, 2012. Shortly afterwards, the new arbitrator sent his CV to both parties. On March 15, CUPW counsel requested that the new arbitrator recuse himself. On March 27, the arbitrator held a hearing on this matter. On April 17, he rendered his decision, refusing to recuse himself. On May 11, Justice Lemieux of the Federal Court ordered the FOS arbitration process to be suspended until a ruling was made on CUPW's application for judicial review of the new arbitrator's appointment as arbitrator.

[176] In a decision released on August 8, 2012, the Federal Court ordered the arbitrator's recusal, finding that "a well-informed person would note that [the] [a]rbitrator ... acted for Canada Post in an important and long-lasting case comparable to the one with which he is now entrusted, possibly raising fears that, consciously or unconsciously, he could favour the position of Canada Post." The Court also found that "[a] well-informed person having thought the matter through may think that the appointed arbitrator, consciously or unconsciously, having recently been actively involved with the Conservative party, would be predisposed to favour the position of Canada Post, which is required to follow the Minister's directives, and whose only shareholder is the government": *Canadian Union of Postal Workers v. Canada Post Corp.*, 2012 FC 975 (CanLII), at paras. 92 and 103.

[177] Meanwhile, negotiations between the parties continued. On July 19, 2012, Canada Post made a new offer. Two of its main provisions were mandated by the Act and were not negotiable: a four year term for the new agreement, with annual wage increases over the life of the agreement of 1.75%, 1.5%, 2%, and 2%. In addition, Canada Post proposed an hourly wage for new hires of $17.50 per hour. On the issue of pensions, Canada Post revived its defined

contribution plan that been withdrawn previously in its offer on May 15, 2011. On the short term disability issue, Canada Post proposed implementation to begin in January 2013.

[178] On October 5, 2012, the parties reached a tentative agreement. Its main terms included an extra, fifth year to the four year term that was prescribed by the Act. Wage increases for CUPW employees were to be 0% in the fifth year of the agreement. Starting wages for new hires was fixed at $19 per hour, with a seven year scale to reach the maximum. In terms of pensions, the parties agreed on a defined benefit plan with early retirement eligibility at age 65/2 years of service or at age 60/30 years of service. In terms of short-term disability, employees were to be entitled to seven days of paid personal leave, with implementation to begin in January 2013. Employees retiring on or after April 1, 2013 would have to pay an increased premium for their Extended Health Care plans. Canada Post's rate of pay for employees on workers' compensation was reduced from 100% to 75%.

[179] In December 2012, postal workers ratified the tentative agreement that had been reached on October 5, with 57% approval of the votes cast. The turnout for this poll was noticeably low, at 28% of CUPW membership.

[180] In this proceeding, the applicants now seek a declaration that the Act is unconstitutional under s. 52 of the *Constitution Act, 1982* – by virtue of having unjustifiably infringed union members' *Charter* freedoms of association and expression – and monetary damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

VIII. LAW AND ANALYSIS

The Test for Infringement of s. 2(d)

[181] *SFL* confirms that "[t]he right to strike is protected by virtue of its unique role in the collective bargaining process" (para. 77). Accordingly, the test is "whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining."

[182] In turn, the meaning to be given to the term "substantial interference" in *SFL* takes its colour from para. 72 of its companion case, *MPAO*: "[w]hatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining." The disruption of balance between the parties is therefore the measure of substantial interference.

[183] The cases disclose the following analytical sequence: there will be a violation of the section 2(d) *Charter* freedom of association if a right to strike has been abrogated so as to substantially interfere with a meaningful process of collective bargaining. The test for "substantial interference" has been articulated in a number of ways over the years but, as the Supreme Court has recently noted at para. 77 of *SFL*, the fundamental determination is whether there has been a disruption of *balance* between employer and employees:

> This brings us to the test for an infringement of s. 2(d). The right to strike is protected by virtue of its unique role in the collective bargaining process. In Health Services, this Court established that s. 2(d) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining (para. 90). And in *Mounted Police*, McLachlin C.J. and LeBel J. confirmed that
>
> > [t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power ... Whatever the nature of the restriction, *the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining* ... . [Emphasis added; para. 72].

[184] Based on the evidentiary record, there can be no question that, on the facts of this case, the *Restoring Mail Delivery for Canadians Act* abrogated the right to strike of CUPW members. The Crown argues, however, that the right to strike has not been abrogated. It contrasts the situation in this case, where the Union engaged in rotating strikes and had the potential to strike for the 100-plus days of bargaining that preceded the work stoppages, with the facts of *SFL*, where the relevant legislation removed any possibility of strike action *ab initio*.

[185] With respect, this is a false distinction. The right to strike is protected insofar as it contributes to a meaningful process of collective bargaining. So long as it makes that contribution, it is deserving of constitutional protection. There is no support for a temporal limit on the right to strike in the jurisprudence of the Supreme Court of Canada. Nor is there any support for the proposition that the right to strike, once engaged (as long as it is contributing to a meaningful process of collective bargaining), can then be taken away without a s. 2(d) violation (subject, of course, to justification under s. 1). Quite the opposite. The facts of this case reveal that the right to strike was actively contributing to a meaningful process of collective bargaining at the very moment of its abrogation by the Act.

[186] The facts in this case demonstrate that the right to strike (and the threat thereof) by CUPW was contributing to a meaningful process of collective bargaining between the parties. Negotiations between the parties began in late 2010 and, on March 15, 2011, Canada Post proposed a four year agreement. By April, CUPW members had voted overwhelmingly to give union leadership a strike mandate. After the strike mandate, Canada Post made another proposal on May 17 that was more favourable to the Union's position, offering better wage increases over the life of the agreement. Clearly the prospect of strike action was contributing to a meaningful process of collective bargaining.

[187] The point about Canada Post's May 17 offer is not only that it offered improved annual wage increases to union members, it also helped to bridge the gap between the parties and move Canada Post closer to the annual wage increases that the Union was proposing.

[188] Canada Post's next offer, on May 24, 2011, and the annual wage increases it now proposed, were even more favourable to the Union's position, proposing annual wage increases of 1.9%, 1.9%, 1.9, and 2% over the life of the agreement. While still some way off the wage increases proposed by the Union in its own offer of May 22, these terms – for wage increases at least – were a significant improvement on the annual wage increases proposed by Canada Post in its initial offer on March 15, 2011, namely 1.5% per annum over the life of the agreement.

[189] To some extent, the same development is evident in negotiations between the parties on the issue of starting wages for new hires. In its first three offers (March 15, May 17, and May 24), the Corporation proposed wages for new hires at $18 dollars per hour, with a seven year scale to reach the maximum. In its June 1 offer, however, and in subsequent offers on June 6 and June 9, Canada Post offered $19 dollars per hour with a seven year scale to reach the maximum. In its own proposal of June 9, CUPW proposed a starting hourly rate of $24.63 for new hires, with a five year scale to reach the maximum.

[190] These facts show that the process of collective bargaining at the relevant times was a live one, with offers and counter offers being proposed and considered in good faith by both sides. There was clearly some prospect of a negotiated solution to their differences before any legislative intervention. The collective bargaining process in the months March to June 2011, that is to say, was a meaningful one.

[191] The Respondent also argues that s. 2(d) was not violated in this case because a meaningful collective bargaining process continued after the Act became law and, ultimately, resulted in the tentative collective agreement reached by the parties on October 5, 2012 (later ratified by the Union in December of that year).

[192] With respect, I do not accept this argument. The test is not whether negotiations continued between the parties after the impugned legislation came into force. The test is whether there was a substantial interference with a meaningful process of collective bargaining. Recall that the concept of balance is crucial to a determination of substantial interference.

[193] The question is whether the Act disrupted the balance between the parties. There can be no doubt that it did. In the immediate aftermath of the tabling of the legislation (June 20), CUPW made a proposal to Canada Post on June 21 that was less ambitious than its previous positions. On June 22, Canada Post tabled a counter proposal which the Union rejected that same day. On June 25, however, on the eve of the enactment of the legislation, CUPW contacted Canada Post to inquire whether the June 22 offer was still on the table. They were told that it was not. In the words of MacDonell, Canada Post's Chief Negotiator, the June 22 offer "wasn't good enough. We needed more ... we needed more savings." Evidently, in the interim between June 22 and June 25, Canada Post hardened its position and sought a more favourable settlement. These facts emphatically demonstrate the disruption in the balance between the parties wrought by the Act.

[194] The Act abrogated the right to strike of CUPW members. The effect of this abrogation was to substantially interfere with – and to disrupt the balance of – a meaningful process of collective bargaining between CUPW and Canada Post. I find accordingly that the Act infringed the s. 2(d) freedom of association of union members and must be justified under s. 1 of the *Charter*.

The s. 1 Justification Analysis

[195] Section 1 of the *Charter* provides that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[196] The operation of s. 1 is set out in the *Oakes* test, which provides that a rights-infringing government measure will be justified under the *Charter* if its objectives are pressing and substantial, if the measures devised to achieve those pressing and substantial objectives are rationally connected to those objectives, if the rights-infringing measures minimally impair the infringed right, and if the salutary effects of the rights-infringing measures are not outweighed by the deleterious effect of those measures on the protected right.

[197] Were the objectives of the Act pressing and substantial? Two different answers are suggested by the jurisprudence. On the one hand, there is the line of authority, relied on by the Respondent, which establishes that Parliament and the legislatures must be afforded a measure of deference at the first stage of the justification analysis. The enacting body, that is to say, must be afforded a "margin of appreciation" as it makes the political, social, and economic choices that are its own particular domain. Accordingly, the Respondent argues that the Act had a pressing and substantial objective in securing a continued postal service to Canada Post customers, in particular those elderly and economically vulnerable Canadians who live in remote, rural locations. The Respondent also argues that the Act had further pressing and substantial objectives in preventing damage to Canada Post and the wider economy generally.

[198] On the other hand, there is the line of authority generated in Dickson C.J.'s dissent in the *Alberta Reference*, and developed by the trial judge and the majority of the Supreme Court of Canada in *SFL*. This line of authority is informed by Canada's international obligations and stands for the proposition that a right to strike may be prohibited:

> (a) in the public service only for public servants exercising authority in the name of the state;
> (b) in essential services in the strict sense of the term;
> (c) in the event of an acute national emergency for a limited period of time.

[199] In his "pressing and substantial" analysis in the *Alberta Reference*, Dickson C.J. observed that "it is ... necessary to define 'essential services' in a manner consistent with the justificatory standards set out in s. 1 ... mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike."

[200] There are two ways to interpret this line of authority. The first is to say that the passages quoted merely inform a tenable definition of "essential services" for the purposes of essential services legislation, and do not necessarily bear on the right to strike in non-essential areas. The second interpretation involves the proposition that the legislative abrogation of the right the strike can *only* involve essential services, and then under restrictive circumstances.

[201] I decline to adopt this second interpretation of Dickson C.J.'s reasons in the *Alberta Reference*, especially as *SFL*, at the Supreme Court of Canada, turned on the "minimal impairment" aspect of the *Oakes* test rather than the "pressing and substantial" component of that test. Also, this second interpretation of Dickson C.J.'s dissent in the *Alberta Reference* would effectively remove an enacting body's "margin of appreciation" in designing legislation that would prohibit or curtail the right to strike. Although noting that, because of technological developments like email and Skype, the postal service is by no means as vital as it once was, I accept that the objectives of this Act were pressing and substantial within the meaning of the *Oakes* test.

[202] The second component of the *Oakes* test – the rational connection test – is more straightforward on the facts of this case. Plainly the prohibition on the right to strike in the Act is rationally connected to the pressing and substantial objective of securing a "vital" service to vulnerable and rural Canadians. CUPW asserts the Act fails the rational connection test because it imposed salary increases that were lower than what the employer had previously offered; it imposed an involuntary mechanism for resolving the labour dispute and combined it with arbitral criteria that were weighted heavily in favour of the employer; it imposed these provisions for a term of four years, it compelled and curtailed the free speech of postal workers; and it imposed penal sanctions for noncompliance with its provisions. With respect, these objections don't obviously go to the rational connection part of the *Oakes* analysis and are better framed in the "minimal impairment" test in *Oakes*.

[203] In *SFL*, the impugned legislation was found to be unconstitutional because it did not minimally impair the s. 2(d) rights of the affected workers. Justice Abella's minimal impairment analysis in *SFL* is worthy of careful attention.

[204] At para. 81, Abella J. agreed with the trial judge that the impugned legislation in that case was not minimally impairing because it provided for "the unilateral authority of public employers to determine whether and how essential services are maintained during a work stoppage with no adequate review mechanism," and because, in the legislation, there was "the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses." These two themes – the potential for unilaterality and the absence of meaningful ADR mechanisms – are developed in the following passages.

[205] Under the impugned legislation in *SFL*, the employer had a unilateral discretion to decide on the categories or workers whose services were essential, and whose right to strike was accordingly abrogated. This was not minimally impairing of the affected employees' right to strike. There was no evidence to support Saskatchewan's position that the continued delivery of

essential services – a pressing and substantial objective – required unilateral rather than collaborative decision-making authority.

[206] Also, the very definition of "essential services" under the impugned legislation required basic judgments to be made about when life, health, safety or environmental concerns, *inter alia*, required an essential services designation. The impugned legislation in *SFL* permitted these fundamental questions to be answered unilaterally by the employer with no access to an effective dispute resolution mechanism for reviewing contested designations.

[207] In addition to the problem of unilaterality, the impugned legislation in *SFL* was found not to be minimally impairing of the right to strike because it did not provide any meaningful access to mechanisms to resolve bargaining impasses, such as arbitration.

[208] In this regard, Abella J. excerpted passages from the reasons of the trial judge which stand for the proposition that the impugned legislation was "devoid of access to independent, effective dispute resolution processes."

[209] Similarly, Abella J. excerpted from Dickson C.J.'s opinion in the *Alberta Reference*, concerning the remedial purpose of arbitration mechanisms when the right to strike has been abrogated by legislation. Chief Justice Dickson agreed with the general proposition that employers and employees should be on an equal footing in strike situations or at compulsory arbitration where the right to strike has been abrogated. He held that "legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party." The purpose of that mechanism, the Chief Justice explained, was "to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective, expeditious manner disputes which arise between employees and employers." In *SFL*, it should be noted, Abella J. gave this last quote special emphasis.

[210] All in all, the impugned legislation in *SFL* was found to be unconstitutional, on the minimal impairment analysis, because of the breadth of essential services the employer could designate without an independent review process, and the absence of an adequate, impartial, and effective alternative mechanism for resolving collective bargaining impasses.

[211] How do those considerations impact the s. 1 analysis to be applied? In this case, unlike *SFL*, there is an arbitration mechanism: the FOS process mandated by the Act in the event that collective bargaining would be unsuccessful. *SFL* requires us to consider whether FOS was an adequate, impartial, and effective alternative mechanism, and whether it balanced the union's loss of bargaining power that resulted from the abrogation of the right to strike.

[212] The FOS process did not redress the loss of balance that was entailed by the Act. Far from putting the parties on an "equal footing," it instead created and exacerbated an imbalance between the parties that had not existed before the legislation was tabled on June 20. This is clear from the Union's considerably less ambitious proposals to Canada Post after June 20, and the hardening of Canada Post's bargaining position – referred to above – between June 22 and the

enactment of the legislation on June 26. The very prospect of FOS arbitration, ushered in by the Act in late June 2011, changed the balance between the parties. That alteration or imbalance subsisted and informed the ensuing negotiations between the parties, notwithstanding that FOS arbitration was never actually engaged.

[213] It seems clear also that the arbitration process contemplated by the Act was structurally inadequate and not impartial. Recall that Abella J. in *SFL* commented on the need for an adequate and effective mechanism "for resolving collective bargaining impasses". The effectiveness of the mechanism, that is to say, is measured by its ability to resolve a bargaining impasse. One of the key impasses between the parties in this case was the annual wage increases of postal workers. The Act imposed a mandatory annual wage increase for postal workers; it took the annual wage increase issue out of the bargaining process. Taking the issue of wages out of the negotiations – that is, taking it off the bargaining table – cannot be said, in any meaningful sense, to have been a resolution to the bargaining impasse between the parties in this case. An outcome dictated by unilateral legislative action, and uninformed by any union consultation or input, is not a resolution to a bargaining impasse; it is the legislative abolition of a bargaining impasse, something quite different. The resolution of an impasse surely requires that the parties at loggerheads have their voices heard and have some input in the decision that solves the impasse. A resolution to an impasse that takes no heed of the parties is an entirely artificial one; it is not a resolution in the spirit of Abella J.'s reasons in *SFL*.

[214] There is also the point made by Dickson C.J. in the *Alberta Reference* that the exclusion of certain subjects from the arbitration process will compromise the effectiveness and fairness of that process. The Chief Justice's observation here is a logical conclusion of his fundamental assumption that the purpose the arbitration process, in the absence of freedom to strike, is to ensure equal bargaining power between the parties. How can arbitration discharge its remedial function if items normally bargainable – in this case, wage increases and the term of the agreement – are not up for negotiation? Taking wage increases and the term of the agreement off the table was fatal to the constitutionality of the impugned legislation in the case at bar. It ensured that that arbitration process would be ineffective and inadequate in crucial respects, and it blunted the remedial function of the arbitration process in the absence of the right to strike.

[215] *SFL* also requires us to assess the impartiality of the arbitration process that replaced the right to strike. The Act allowed the Minister to appoint the FOS arbitrator without any consultation with or input by the parties. By itself, that raises the problem of unilaterality discussed in *SFL*. But, in addition, there is the salient fact that the government is the sole shareholder of Canada Post. The intimate relationship between the government and Canada Post created the potential for a reasonable apprehension of bias in the appointment of an arbitrator under the Act, especially in the absence of meaningful consultation with the Union about the appointment.

[216] The structural defects of the Act made themselves apparent in the arbitral appointments that were attempted by the Minister in 2011 and 2012. The appointment of the second arbitrator was problematic in light of Abella J.'s discussion in *SFL* of the need for impartiality in the arbitration process. The Federal Court observed that "[a] well-informed person ... may think that

the appointed arbitrator ... having recently been actively involved with the Conservative party, would be predisposed to favour the position of Canada Post, which is required to follow the Minister's directives, and whose only shareholder is the government."

[217] The appointment process of a FOS arbitrator in this case was inherently flawed. Those flaws revealed themselves in two appointments that were subsequently quashed by the Federal Court, the second on the ground of reasonable apprehension of bias. It cannot be maintained that the arbitration process was an impartial one in the sense discussed by Abella J. in *SFL*. Taken together with my previous conclusions on the adequacy and effectiveness of the arbitration process, the Act did not minimally impair the s. 2(d) rights of the CUPW workers and is not saved by s. 1 for that reason.

The Test for Infringement of s. 2(b)

[218] The test has been articulated by the Supreme Court of Canada relatively recently in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, at para. 38. Three questions must be considered:

1) whether the expressive activity in question conveys meaning;
2) whether it is excluded from protection by virtue either of its location or of its method of expression;
3) whether the protected expressive activity is infringed by either the purpose or the effect of government action.

[219] Did the CUPW strikes express meaning in the sense required by s. 2(b) of the *Charter*? I find that they did. It is clear from the affidavit evidence of union members, submitted by the applicants, that the rotating strikes – beginning at the Canada Post facility in Winnipeg – were at least partially devoted to expressing CUPW's discontent with what it felt to be unfair work practices and requirements. That expression was clearly aimed at the employer, Canada Post, and the wider public.

[220] For example, the affidavit of Ronald Hannon, a Union member and shop steward at the Winnipeg local branch of CUPW, offers persuasive evidence going to the expressive content of the strike at the Canada Post facility in Winnipeg. The Canada Post facility in Winnipeg began a modernization program in September 2010, which evidently induced considerable unhappiness and anxiety in CUPW members charged with its implementation. It is Mr. Hannon's evidence that the Winnipeg local was chosen as the first local branch to go on rotating strikes in early June 2011, in order to protest the health and safety issues concerning CUPW members that were implicated by the modernization plan at their plant, and to communicate Union concerns to the Corporation, the Government, and the wider public: Affidavit of Ronald Hannon, Applicants' Application Record, Vol. II, Tab. 3, paras. 7-14, 15-20, 31-36. I accept that the rotating strike of CUPW Winnipeg local members at their plant had expressive content and that it sought to convey meaning in a sense recognized by s. 2(b) *Charter* jurisprudence.

[221] The Respondent submits that the withdrawal of labour is not inherently communicative. That is evidently true. However, I do not agree with the Respondent's submission that, in the

labour context, "it is only through communicative activities such as picketing and leafleting that the reasons for withdrawal, or 'meaning' are conveyed."

[222] I do not accept such a restrictive interpretation of the scope of protected expressive activity in a labour context. Expressive meaning in the labour context can go beyond mere picketing and leafleting. Paragraph 58 of Abella J.'s reasons in *SFL* indicates that "strike action brings the debate on the labour conditions with an employer into the public realm." That statement makes eminent sense in a digital age with almost universal access in Canada to the news media. With the right conditions, that is to say, a strike is, *ipso facto*, an expression of meaning that is protected by the *Charter*, whether or not the strike is accompanied by picketing or leafleting. I make this last point because there is some dispute between the parties whether Union picketing continued after the enactment of the legislation. It is unnecessary to decide that dispute because the obvious media attention that was devoted to the strike in this case means that the conveyance and communication of meaning by CUPW did not depend on picketing and leafleting at Canada Post facilities. The corollary of that proposition is that the continuance of picketing and leafleting at Canada Post facilities after the enactment of the legislation (if any) is no true measure of the impairment of the Union members' s. 2(b) rights, and their ability to be heard in the public realm. The strike itself clearly sought to communicate meaning about CUPW's grievances. Boiled down to its essentials, and aside from the economic pressure it clearly exerted, CUPW's rotating strikes attempted to say to the employer, and the wider public, "we are unhappy with our work conditions and ask that they be improved."

[223] Support for this line of reasoning is found by contrasting the focus of the s. 2(d) analysis with the focus of the s. 2(b) analysis, as it relates to a restriction on strikes. The s. 2(d) analysis of strike action focuses on the ability of workers to use economic leverage in a collective bargaining dispute with their employers. In this way, the state's effect on the balance between these competing parties is the key consideration. On the other hand and in contrast, the s. 2(b) analysis is not concerned with how the state may impinge on the material and economic incentives of removing one's labour, but rather this analysis focuses on whether individual members and their union are able to use strike action to symbolically express their ideas, concerns, and, most importantly, their human dignity. This ability of the strike to allow workers to express and affirm their human dignity is described by Abella J. in *SFL*, at para. 54: "The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives."

[224] Therefore, by using the rotating strikes to express particular concerns about their working conditions, with specific sites being chosen to highlight specific workplace concerns, the CUPW strike shows how a strike action may be used to advance a material purpose and a symbolic, expressive purpose.

[225] There is no suggestion in the evidentiary record that the Union's expressive activity in striking was violent or that it is undeserving of s. 2(b) protection because of the manner or the location of its expression. Accordingly, the second limb of the test is satisfied.

[226] Going to the final limb of the test, whatever about its purpose, the effect of the legislation clearly infringed the s. 2(b) rights of Union members. If striking in this case was an expressive activity deserving of s. 2(b) protection (as I have found it to be), then the Act's prohibition of strike action clearly had the effect of infringing that expressive right. Accordingly, the Act must be justified under s. 1 of the *Charter*.

[227] A similar and separate analysis is also possible with s. 5(c) of the Act, which provides that "The union and each officer and representative of the union must ... refrain from any conduct that may encourage employees not to comply with paragraph 3(*b*)." It is immediately noticeable that s. 5(c) casts a very wide net. It prohibits any conduct that may encourage employees to refuse to resume employment within the meaning of s. 3(b) of the Act. The conduct that is prohibited by this provision clearly includes expressive conduct. A returning worker might have wished to express his or her legitimate dissatisfaction with the new legislation, and yet such an expressive act could have led to large fines under s. 18 of the Act. The kind of legitimate dissent and criticism contemplated is entirely peaceful and traditional in a democratic society: the prohibited expressions of dissatisfaction contemplated would neither be violent nor performed in areas that would exclude them from s. 2(b) protection. As a result, this provision is a second, *prima facie* violation of s. 2(b).

The s. 1 Justification Analysis

[228] What I have said above applies equally to the s. 2(b) analysis: the objectives of the Act were pressing and substantial, and the methods adopted to achieve those purposes were rationally connected to them.

[229] This takes us to the minimal impairment part of the *Oakes* test. It is important to note that minimal impairment does not mandate a particular outcome or allow the Court to dictate a solution. As was said by the Supreme Court of Canada in *Montréal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141 [*Montréal (City)*], at para. 94: "[t]he Court will not interfere simply because it can think of a better, less intrusive way to manage the problem."

[230] *Montréal (City)* was a case where a city by-law, prohibiting noise on public streets emanating from sound equipment, was found to infringe s. 2(b) and yet was justified as a minimal impairment of the *Charter* freedom of expression. The Supreme Court of Canada observed, at para. 94, that "in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude."

[231] There is no question that the federal government is entitled to a measure of latitude in devising the provisions in the Act that served the pressing and substantial objective of ensuring mail delivery in Canada. Section 3(b) of the Act provides that "every employee must, when so required, resume without delay, or continue, as the case may be, the duties of the employee's employment." It is hard to see how this provision, on its face, does not accord with the minimal impairment branch of the *Oakes* test, as it applies to the freedom of expression right in the *Charter*.

[232] This complete prohibition however must be considered in relation to the expressive aspect of the strike. By removing any ability of CUPW and its members to perform even limited strike actions in a site-specific manner, which was the very nature of the rotating strikes, there was no possibility for any expression of meaning to be conveyed through the medium of strike action. McLachlin J. (as she then was) noted in *RJR-MacDonald*, at para. 160, "... the law must be carefully tailored so that rights are impaired no more than necessary." A complete prohibition on any strike activity cannot be seen as minimally impairing of the freedom of expression rights of the Applicants, as any removal of their labour was not only disallowed, but punishable by s. 18 of the Act.

[233] By failing at the minimal impairment stage, the complete prohibition on strike actions in this case is not saved by s. 1.

[234] Section 3(b) of the Act must also be read in conjunction with s. 5(c), the source of the second, *prima facie* violation. As noted above, s. 5(c) casts a very wide net by prohibiting "any conduct". This provision had a clear impact on Union members' s. 2(b) expressive rights. The Act itself was passed in the face of obvious and total Union unhappiness with its provisions. Union members would have had a legitimate right to express that unhappiness and disappointment while, at the same time, accepting their legal obligation to return to work. The terms of s. 5(c) of the Act are drawn so widely, that is to say, that they might catch legitimate dissent and criticism. The terms of the Act are so wide that words uttered in the workplace (or outside of it; the Act makes no distinction) might have the effect of encouraging non-compliance with s. 3(b) even when that effect was not intended or not contemplated by the author of the offending statement. That effect would surely not be a minimal impairment of Union members' s. 2(b) rights and cannot be within the reasonable latitude contemplated by the Supreme Court of Canada in *Montréal (City)*. The terms of s. 5(c) of the Act are too wide. They catch and penalize far more speech than is reasonable to be a reasonable impairment of the Applicants' s. 2(b) rights.

[235] For similar reasons, s. 5(c) of the Act fails at the final limb of the *Oakes* analysis, the proportionality *stricto sensu* test. For the reasons I have mentioned, the deleterious effect of s. 5(c) is significant in terms of stifling legitimate dissent and criticism by workers about their conditions of employment, their solidarity among themselves as a group, and their individual emotional health and sense of self-worth. It would take very pressing and persuasive salutary effects of the Act to counteract such deleterious effects. No such evidence is proffered in this regard, at least in the s. 2(b) *Charter* context and in relation to s. 5(c) of the Act. As a matter of common sense, it is hard to see how s. 5(c) adds anything to the back-to-work provisions in the Act as a whole.

[236] Section 3(b) of the Act established a legal obligation on striking workers to resume their duties when requested to do so. Was the atmosphere among Canada Post workers so mutinous or their attitude to the Act so subversive, that s. 3(b) required the addition of s. 5(c) in order to accomplish this goal? There is no evidence to support that proposition. It would take powerful and compelling evidence to demonstrate the salutary effects of s. 5(c) of the Act, so as to countervail the considerable deleterious effects on Union Members' s. 2(b) *Charter* rights.

IX. REMEDY

[237] Having found that the Act violated postal workers' freedoms of association and expression in an unjustified manner, I now turn to the question of what the appropriate remedy is in this case.

[238] In the consent agreement between the parties, the Applicants seek a retroactive remedy under s. 52 of the *Constitution Act, 1982* together with monetary damages under s. 24(1) of the *Charter*.

[239] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1) of the *Constitution Act, 1982*, which provides that the law is of no force or effect to the extent that it is inconsistent with the Constitution: *R. v. Ferguson*, [2008] 1 S.C.R. 96 [*Ferguson*], at para. 59.

[240] In contrast to s. 52(1), s. 24(1) of the *Charter* is deployed as a remedy for unconstitutional government acts rather than unconstitutional laws: *Ferguson*, at para. 60.

[241] The remedial function of s. 24(1) of the *Charter*, generally, is to compensate and vindicate the victims of *Charter* violations, and to deter future *Charter* violations: *Ward v. Vancouver*, 2010 SCC 27, [2010] 2 S.C.R. 28. The recent case *Henry v British Columbia*, 2015 SCC 24, [2015] 2 S.C.R. 214, establishes a high threshold that applicants must satisfy before a court of competent jurisdiction will award them *Charter* damages. Something more than gross negligence is required on the part of government actors, although malice is not required to satisfy the threshold: *Henry*, at paras. 56, 92. *Henry* also sets forth an exacting "but for" causation requirement between the damage suffered by the Charter claimant and the impugned government act or acts: paras. 95-98.

[242] It should be noted that ss. 24(1) and 52(1) remedies are generally not combined: *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at paras. 19, 110; *Mackin v. New Brunswick*, [2002] 1 S.C.R. 405, at para. 82; *Ferguson*, at para. 61. However, as it was noted by the Supreme Court in Canada in *Ferguson*, at para. 63: "the jurisdiction of this Court allows a s. 24(1) remedy in conjunction with a s. 52(1) declaration of invalidity in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy."

[243] The facts of this case do not bring it within those "unusual cases" contemplated in *Ferguson*, where combined remedies under ss. 24(1) and 52(1) are appropriate.

[244] I find that an award of damages under s. 24(1) of the *Charter* is not appropriate here. The Supreme Court of Canada has stressed that s. 24(1) remedies exist for the purposes of compensation, vindication, and deterrence in the face of conduct by state actors. There was no conduct on the part of government officials in this case that would warrant an award of *Charter* damages. Declaratory relief is, in my view, sufficient to provide the Union and its members a meaningful remedy for the violation of their constitutional freedoms.

[245] Declaratory relief under s. 52(1) of the *Charter* is clearly warranted. Section 52(1) empowers courts of competent jurisdiction to declare legislation of no force or effect to the extent of its inconsistency with the Constitution. The court's remedial discretion exists to rectify constitutional defects like those in the statute presently impugned. In the circumstances of this application, a complete declaration of invalidity is appropriate. The Act is narrow and targeted in scope. Reading down or severing those of its provisions which offend the *Charter* would strip the Act bare and render it completely ineffectual in any event.

[246] Under s. 52(1) of the *Constitution Act, 1982*, the norm is that declarations of invalidity apply retroactively. Purely prospective remedies are only justified when, *inter alia*, they are fair to plaintiffs/applicants and where there has been reasonable reliance on law that has subsequently changed substantially: *Canada v. Hislop*, [2007] 1 S.C.R. 429, at paras. 110-117.

[247] The circumstances of this case are not appropriate to disturb the normal assumption that constitutional remedies apply retroactively. To do otherwise would not work fairness to the Applicants in this case or provide them with a meaningful remedy. Also, the recent *SFL* decision did not substantially change the law; rather, it marked the culmination of a jurisprudential arc that had its beginnings in Dickson C.J.'s dissent in the *Alberta Reference*, and which matured in the *Health Services* decision of 2007.

[248] The Act is declared to have violated the Applicants' freedom of association protected under s. 2(d) of the *Charter*. This violation is not saved under s. 1.

[249] The Act is further declared to have violated the Applicants' freedom of expression protected under s. 2(b) of the *Charter*. This violation is not saved under s. 1.

[250] The Act is declared to have been unconstitutional and of no force or effect. Such declaration of invalidity is to be applied retroactively.

[251] If the parties are unable to agree on the issue of costs, they may contact me, if necessary, in order to set a timetable for the delivery of written costs submissions.

Firestone J.

Released: April 28, 2016

CITATION: Canadian Union of Postal Workers v. Her Majesty in Right of Canada, 2016 ONSC 418

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CANADIAN UNION OF POSTAL WORKERS/SYNDICAT DES TRAVAILLEURS ET TRAVAILLEUSES DES POSTES, DENIS LEMELIN, RON HANNON and JEREMY LECLAIR

Applicants

– and –

HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADA POST CORPORATION

Intervener

REASONS FOR JUDGMENT

Firestone J.

Released: April 28, 2016